Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-651

TEAMSTERS LOCAL UNION 657,
Petitioner,
vs.
JESSE RODRIGUEZ, SADRACH G. PEREZ and MODESTO HERRERA,
on Their Own Behalf and on Behalf of Those Similarly Situated,
Respondents,
and
TEAMSTERS LOCAL UNION 657,
Petitioner,
vs.
ERNEST HERRERA, TRINE URIBE and MARIO MELCHOR,
Respondents,
and
TEAMSTERS LOCAL UNION 657,
Petitioner,
vs.
PATRICK RESENDIS, TONY ESCOBEDO, WILBURN WHITE,
ARTURO RODRIGUEZ and ELIAS GONZALEZ,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Fifth Circuit

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INDEX

	Page
I. Opinions Below	2
II. Jurisdiction	2
III. Questions Presented	3
IV. Statutes Involved	4
V. Statement of the Cases	5
VI. Reasons for Granting the Writ	9
1. Conflict between Civil Rights Act and National Labor Relations Act	9
2. Conflict between Supreme Court and Circuit Court Decisions	9
3. Conflict between Decisions of the Circuit Courts	9
4. The Legal Dilemma of Petitioner	9
5. Conflict between Supreme Court and Court of Appeals	12
6. Conflict between Circuit Courts	13
VII. Conclusion	14
Certificate of Service	15
Appendix A—Findings of fact and conclusions of law of the United States District Court for the Western District of Texas, San Antonio Division in Case No. SA-71-CA-302	A-1
Appendix B—Opinion of the Fifth Circuit Court of Appeals in Case No. 73-2801	A-13

Appendix C—Findings of fact and conclusions of law of the United States District Court for the Western District of Texas, San Antonio Division in Case No. SA-71-CA-296 ..... A-68

Appendix D—Opinion of the Fifth Circuit Court of Appeals in Case No. 73-2254 ..... A-74

Appendix E—Findings of fact and conclusions of law of the United States District Court for the Western District of Texas, San Antonio Division in Case No. SA-71-CA-282 ..... A-79

Appendix F—Opinion of the Fifth Circuit Court of Appeals in Case No. 73-2322 ..... A-87

Appendix G—Judgment of the Fifth Circuit Court of Appeals reversing and remanding judgment of the District Court in Case No. 73-2801 (SA 71-CA-302) A-95

Appendix H—Judgment of the Fifth Circuit Court of Appeals reversing and remanding judgment of the District Court in Case No. 73-2254 (SA-71-CA-296) A-97

Appendix I—Judgment of the Fifth Circuit Court of Appeals reversing and remanding judgment of the District Court in Case No. 73-2322 (SA-71-CA-282) A-99

Appendix J—Order of Fifth Circuit Court of Appeals denying Petition for Rehearing in Case No. 73-2801 .... A-101

Appendix K—Order of Fifth Circuit Court of Appeals denying Petition for Rehearing in Case No. 73-2322 .. A-103

Appendix L—Order of Fifth Circuit Court of Appeals denying Petition for Rehearing in Case No. 73-2254 .. A-105

TABLE OF AUTHORITIES

Cases

Herrera v. Yellow Freight System, Inc., 505 F.2d 66 (5th Cir. 1974) 2

N.L.R.B. v. Borg-Warner, 356 U.S. 342 ..... 3, 12, 13

N.L.R.B. v. International Brotherhood of Electrical Workers, 266 F.2d 349 (5th Cir. 1959) 11, 13

N.L.R.B. v. Truck Drivers Local Union, 353 U.S. 87 12

Resendis v. Lee Way Motor Freight, Inc., 505 F.2d 69 (5th Cir. 1974) 2

Rodriguez v. East Texas Motor Freight, 505 F.2d 40 (5th Cir. 1974) 2, 3

Sabala v. Western Gillette, Inc., 516 F.2d 1251 (5th Cir. 1975) 5

Thornton v. East Texas Motor Freight, 497 F.2d 416 (6th Cir. 1974) 3, 8, 10, 11, 13, 14

Statutes

28 U.S.C. Sec. 1254 3

29 U.S.C. Sec. 159(a) 3, 5

29 U.S.C. Sec. 159(b)(3) 11, 13

42 U.S.C. Sec. 1981 ..... 3, 4, 6

42 U.S.C. Sec. 2000e-2 ..... 3, 4, 6

42 U.S.C. Sec. 2000e-2(c)(1) 4

42 U.S.C. Sec. 2000e-2(c)(2) 4

42 U.S.C. Sec. 2000e-2(c)(3) 4

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To the United States Court of Appeals
for the Fifth Circuit

To the Honorable Warren E. Burger, Chief Justice of the Supreme Court of the United States and the Associate Justices of the Supreme Court of the United States:

This is a single petition by Teamsters Local Union 657 of San Antonio, Texas for a Writ of Certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit entered in the above three cases.

I. OPINIONS BELOW

1. The opinion of the District Court in the Rodriguez case is unreported. A copy thereof is attached hereto as Appendix A (A-1). The opinion of the Court of Appeals in this case is reported in 505 F 2d 40 and is attached hereto as Appendix B (A-13).

2. The opinion of the District Court in the Herrera case is unreported. A copy thereof is attached hereto as Appendix C (A-68). The Court of Appeals opinion in this same case is reported in 505 F 2d 66 and is attached hereto as Appendix D (A-74).

3. The District Court opinion in the Resendis case is unreported. A copy thereof is attached hereto as Appendix E (A-79). The Court of Appeals opinion in this case is reported in 505 F 2d 69 and is attached hereto as Appendix F (A-87).

II. JURISDICTION

The date of the judgments sought to be reviewed, and the time of their entry, is November 25, 1974 in all three cases, as shown by Appendices G, H and I, attached hereto (A-95-A-100).

Timely Motions for Rehearing were filed in all three cases, and an order denying a rehearing was entered in each case on

August 18, 1975. These orders are attached hereto as Appendices J, K and L (A-101-A-106).

The statutory provision believed to confer on this Court jurisdiction to review the judgments in question is Section 1254 of Title 28 of the United States Code.

III. QUESTIONS PRESENTED

The questions presented for review are:

1. Whether a local labor union is responsible, under 42 U.S.C. Section 2000e-2 or 42 U.S.C. Section 1981, for any discriminatory "lock-in" effects resulting from separate contracts for road and city drivers in the trucking industry, where such contracts are National and Regional in scope, have not been negotiated by the local union, and no road driver jobs have ever existed within the jurisdiction of the local union.

2. Whether the opinion of the Fifth Circuit Court of Appeals in *Rodriguez v. East Texas Motor Freight*, 505 F 2d 40, conflicts with that of the Sixth Circuit Court of Appeals in *Thornton v. East Texas Motor Freight*, 497 F 2d 416, relative to the answer to the above stated question.

3. Whether the duty of a local labor union to represent employees under 42 U.S.C. Section 2000e-2 and 42 U.S.C. Section 1981, as imposed by the Fifth Circuit Court of Appeals in the above cases, conflicts with the limitations upon the right to represent employees, under 29 U.S.C. Section 159(a), as stated by the United States Supreme Court in *N.L.R.B. v. Borg-Warner*, 356 U.S. 342.

4. Whether an integrated local labor union, the majority of whose members are Mexican-American and black, which signs racially neutral collective bargaining agreements, upon the man-

date of its membership, violates 42 U.S.C. Section 2000e-2 or 42 U.S.C. Section 1981, by reason of the so called "lock-in" effects of such contracts, when coupled with prior hiring policies of the employers.

IV. STATUTES INVOLVED

1. The following portion of Title VII of the Civil Rights Act of 1964:

"(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin (42 U.S.C. Sec. 2000(e)-2 (c)(1));

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex or national origin; or (42 U.S.C. Sec. 2000(e)-2(c)(2))

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section." (42 U.S.C. Sec. 2000(e)-2(c)(3))

2. 42 United States Code, Section 1981 as follows:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall

be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

3. The following portion of the National Labor Relations Act, as amended:

"(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment, . . ." (29 U.S.C. Sec. 159(a))

V. STATEMENT OF THE CASES

The Rodriguez case was brought against East Texas Motor Freight, Inc.; the Herrera case against Yellow Freight System, Inc.; and the Resendis case against Lee Way Motor Freight, Inc. Petitioner was also made a defendant in all three cases, as was the Southern Conference of Teamsters. The International Brotherhood of Teamsters is named as a defendant in the Herrera and Resendis complaints.

The Rodriguez case is a class action, brought on behalf of all Mexican-American and black city drivers of East Texas Motor Freight in the State of Texas. The Herrera and Resendis cases were brought only on behalf of the individual Plaintiffs.

They were tried in tandem before the United States District Court for the Western District of Texas, and orally argued at the same time on appeal to the Fifth Circuit Court of Appeals. The Fifth Circuit has referred to the three cases as the "Rodriguez trilogy." *Sabala v. Western Gillette, Inc.* (5th Cir., 1975), 516 F 2d 1251, 1253.

References to the printed records in the Circuit Court, which consisted of one volume in each case, will be made by the names "Rodriguez", "Herrera", and "Resendis" followed by the page number. References to the appendix to this petition will be indicated by the letter "A" followed by the page number.

Except for the Plaintiffs Wilburn White and Arturo Rodriguez, all of the named Plaintiffs were city truck drivers for their respective employers in San Antonio, Texas. White is a Negro casual driver for Lee Way Motor Freight in San Antonio, and Rodriguez was formerly a regular road driver in San Antonio for the same company (F-1303). All of the named Plaintiffs were members of Petitioner.

Their complaints allege violations by all Defendants of 42 U.S.C. Section 2000e 2 and 42 U.S.C. Section 1981. The single theme found by the Court of Appeals to exist in the "Rodriguez trilogy" was that the employers had engaged in illegal discriminatory hiring practices which were proven by statistics showing a racial imbalance in the composition of their road driver personnel, and that Petitioner had continued the effects of such illegal hiring practices, by the creation and maintenance of separate seniority rosters for road and city drivers, without a provision for seniority carryover (B-1282-1283).

In all these cases, all of the Plaintiffs (except White) stipulated that they were employed by their respective employers without regard to race, color or national origin (Rodriguez-417; Herrera-60-62; Resendis-75).

The geographical jurisdiction granted to Petitioner, by the International Brotherhood of Teamsters is limited by its Charter to several counties in South and Southwest Texas (Rodriguez-433). In the Rodriguez and Herrera cases, the employers East Texas Motor Freight and Yellow Freight System have never had road driver jobs within the representation jurisdiction of Petitioner (Rodriguez-417, 422; Herrera-259, 455).

The statistical evidence of the racial composition of the road driver personnel of East Texas and Yellow Freight is from geographical points outside the jurisdiction of Petitioner (D-1297). And the employers have always exercised full responsibility for the hiring of employees and the Petitioner has never exercised any (B-1283).

Petitioner neither negotiated, or was responsible for the ratification of the separate contracts for road and city drivers. They were the product of a multi-union bargaining committee negotiating with a multi-employer committee, National and Regional in scope, and ratified by members of the bargaining unit (B-1281-1282).

Petitioner has never signed, or administered, a contract with either East Texas or Yellow Freight covering road driver jobs for the reason that such jobs have never existed within its jurisdiction.

Petitioner is an integrated labor union (B-1282). Since 1965, the majority of its total membership, and the majority of its members working under the National and Regional contracts, have been Mexican-American and Negroes (Rodriguez-420-421). It was the members working under such contracts that authorized the execution of the power of attorney, from Petitioner to the multi-union committee to negotiate them (Herrera 383-384). It was the same group of members who voted, as part of the National and Regional bargaining units, to ratify or reject the product of the negotiating committees, (Herrera 385-388).

Between 1953 and 1973 no members of Petitioner ever made a request for a contractual right to carry city seniority to road driver jobs, or made a complaint to Petitioner that the existence of separate seniority rosters discriminated against Mexican-American and Negroes (Herrera 388-389). Petitioner does not believe that there is any evidence in the record showing that

Petitioner was aware of the racial imbalance in the road driver complements of East Texas and Yellow Freight at its terminals outside the jurisdiction of Petitioner.

East Texas, Yellow Freight and Lee Way, are part of a multi-employer bargaining group, Trucking Employers, Inc., which negotiated the National and Regional contracts with the multi-union negotiating committee (A-1281). In 1967, another local union submitted a proposal to the bargaining committee that East Texas eliminate its no-transfer rule but the company refused to accede thereto. *Thornton v. East Texas*, supra. In the *Thornton* case the employer had road driver jobs within the jurisdiction of that local union defendant. Petitioner in this case solicited road driver jobs, outside its jurisdiction, for its members doing city driving (Rodriguez-55-57; 73-74).

As late as February 11, 1973, the members of Petitioner working under the National and Regional contracts with the truck lines, with 96 Mexican-American and Negro members present as opposed to 42 Anglo members, refused to submit to the negotiating committee a request for changes in their contract seniority (Rodriguez 275-279).

VI. REASONS FOR GRANTING THE WRIT

There are three special and important reasons why the writ should be granted:

1. An important question of Federal law is involved which requires a reconciliation of the National Labor Relations Act with the Civil Rights Act of 1964 because of a conflict between a local labor union's limitations in representing employees under one statute with its responsibility in representing them under the other, where a national or regional collective bargaining agreement is involved.

2. The decisions of the Court of Appeals in the instant cases conflict, on the federal questions involved, with applicable decisions of the United States Supreme Court.

3. The Fifth Circuit Court of Appeals has rendered decisions herein which conflict with a decision by the Sixth Circuit Court of Appeals on the same matter.

The Legal Dilemma of Petitioner in Negotiating With the Employers

4. It is respectfully submitted that the Court of Appeals has found that Petitioner violated the Civil Rights Act of 1964, and stated a way in which Petitioner might have remedied the discrimination, without taking into consideration the limitations placed upon Petitioner by the National Labor Relations Act in representing employees.

It is legally impossible for Petitioner, *acting alone*, in its capacity as a local labor union, to obtain for Respondents contractual rights to road driver jobs and seniority, under national and regional collective bargaining agreements. The controlling

labor law confines Petitioner to the representation of its own members. When it undertakes to participate in national or regional negotiations, other local unions must be afforded a voice therein for their members.

By giving a power of attorney to a negotiating committee, representing numerous unions, Petitioner transferred its rights and powers, as exclusive bargaining representative under the National Labor Relations Act, to the committee. The contract that results from the multi-employer, multi-union negotiations cannot be rejected by the action of a single local union in the over-all unit.

In the *Thornton* case, the local union involved submitted a request to the bargaining committee for the merger of the road and city seniority rosters of East Texas. This was rejected by the employer, and left out of the resulting contract submitted to all members of the multi-union unit for acceptance or rejection. There were road driver jobs at East Texas terminals, within the jurisdiction of the local union in the *Thornton* case, so its request for merged seniority rosters was a valid bargaining demand. However, the fact it was not included in the final contracts, approved by the members of the over-all unit, did not give to that union the right to strike, or otherwise economically coerce, the employer into granting its request.

If it is assumed that the Petitioner herein could have avoided being bound by national and regional agreements, by not assigning its bargaining rights, it is immediately faced with another limitation by the National Labor Relations Act.

In both the Rodriguez and Herrera cases road driver jobs have never existed within the representation jurisdiction of Petitioner (Herrera-1297). Therefore, if Petitioner enters into direct contract negotiations with either East Texas or Yellow Freight, only on behalf of its own members, the National Labor

Relations Act confines Petitioner to the jobs at the employer's terminals within its jurisdiction.

The Fifth Circuit Court of Appeals in *N.L.R.B. v. International Brotherhood of Electrical Workers* (1959), 266 F 2d 349, found a local union violated 29 U.S.C. Section 159(b)(3) by insisting as a condition of any agreement, that the bargaining unit be enlarged to include certain operations of the employer being performed by members of another union.

Any correction that should have been made by Petitioner, of any discrimination resulting from separate seniority rosters, had to either be made with the employer's consent, or directed by the Courts. Petitioner has never exercised any authority over hiring so the problem was not created by it. In *Thornton*, the employer refused a negotiating demand for merged seniority rosters, and also refused Petitioner's requests of it to voluntarily give Respondents road jobs. Thus, the only means left to Petitioner to obtain the necessary agreements from East Texas was to try some form of economic coercion which would have violated the National Labor Relations Act.

The Petitioner did not even know of the racial imbalance between road drivers and city drivers in Rodriguez and Herrera, and no members ever complained that separate seniority rosters discriminated against Mexican-American and Negroes. For these reasons, Petitioner should not be faulted for failing to initiate some type of legal proceeding to make the changes the Court of Appeals said it should have made.

The above stated conflicts between the application of the Civil Rights Act of 1964 and the National Labor Relations Act are very important to parties involved in collective bargaining between management and labor, on a national and regional scale. Probably most workers, and the largest industries in the United States, have contracts negotiated in a similar manner.

Therefore, the rights and responsibilities of all parties should be defined by this Court.

The importance of the above question is shown by the words of this Honorable Court in *National Labor Relations Board v. Truck Drivers Local Union 449* (1957), 353 U.S. 87:

> "The debates over the proposals demonstrate that Congress refused to interfere with such bargaining because there was cogent evidence that in many industries the multi-employer bargaining basis was a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining."

The Conflict With Decisions of the United States Supreme Court

5. It appears that the Court of Appeals decisions in the Rodriguez and Herrera cases conflict with the opinion of the Supreme Court in *National Labor Relations Board v. Borg-Warner Corp.* (1958), 356 U.S. 342.

In the *Borg-Warner* case, collective bargaining subjects are broken down into mandatory and permissive categories. A party to the collective bargaining process proposing a permissive bargaining subject cannot insist upon that subject becoming a part of the collective bargaining agreement, either to the point of an impasse in the negotiations, or by engaging in economic coercion to obtain it. A party who violates this rule is subject to being charged with an unfair labor practice and enjoined by the Federal Government from further demanding acceptance of his proposal.

In the absence of any road driver jobs at East Texas and Yellow Freight, within Petitioner's jurisdiction, a demand for rights to such jobs would be a permissive bargaining subject,

obtainable only by the voluntary concurrence of the employers. In fact, in *Electrical Workers*, supra, the Court of Appeals cited *Borg-Warner* as authority for its decision that a union in that case had unlawfully refused to bargain in violation of 29 U.S.C. Section 159(b)(3), by insisting, as a condition of any agreement, that the bargaining unit be enlarged to include certain operations being performed by members of another union.

Petitioner is not suggesting that it is under any mandate to violate The National Labor Relations Act, but only points out the conflicting court decisions it would have been confronted with had it attempted to remedy the continuing effects of discrimination, in the face of opposition by the employers.

The Conflict Between the Fifth and Sixth Circuit Court of Appeals

6. The opinion of the Court of Appeals in these three cases conflicts with that of the Sixth Circuit Court of Appeals in *Thornton v. East Texas*, supra, in that the Fifth Circuit holds Petitioner responsible for the separate seniority rosters, whereas the Sixth Circuit held that the local union in that case was not liable.

In the Rodriguez and Thornton cases the same employer is a defendant, the very same national and regional contracts are involved, and the same form of discrimination is alleged —continuing the effects of hiring discrimination by the maintenance of separate contracts for road and city drivers.

The differences in the facts of the two cases are that in *Thornton*, the employer had road driver jobs within the jurisdiction of the local union involved, whereas, in Rodriguez there were no road jobs in Petitioner's jurisdiction. In *Thornton* the members of that union requested merged seniority rosters, which

was rejected, whereas, in Rodriguez the members of Petitioner expressly order it *not* to seek changes in their seniority rights.

Since Petitioner is an integrated union, the majority of whose members are Mexican-American and Black, its good faith representation of its membership is even more evident than was that of the local union in *Thornton*.

The importance of resolving the conflict between the two Circuits lies in the fact that one of the major industries of the country, with hundreds of thousands of employees, is involved and, historically, the contracts are renegotiated every three years, so that there is a need for stability and uniformity in the approach of the various local unions to the negotiations of these contracts.

VII. CONCLUSION

Wherefore, Petitioner prays that a writ of certiorari issue to review the judgments of the United States Circuit Court of Appeals for the Fifth Circuit in the three above entitled cases.

Respectfully submitted

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Certificate of Service

In accordance with the rules of the Court, true copies of the foregoing petition have been served upon the following counsel of record by placing same in the U. S. Mail with first class air mail postage prepaid on this 24th day of October, 1975:

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Edward W. Penshorn

APPENDIX

APPENDIX A

In the District Court of the United States
For the Western District of Texas
San Antonio Division

Jesse Rodriguez, et al.,
v.
East Texas Motor Freight, et al.,
Civil Action No. SA-71-CA-302

Findings of Fact and Conclusions of Law

On the 29th day of January, 1973, came on to be heard the above entitled and numbered cause for trial on the merits, and both parties appeared in person and by their Attorneys of Record and announced ready for trial, whereupon the Court proceeded to hear the evidence from the witnesses and oral arguments of counsel and at the conclusion of the trial and after consideration of all the pleadings, the evidence adduced by both parties, the arguments of counsel and applicable law, the Court hereby makes its Findings of Fact and Conclusions of Law.

Findings of Fact

1. This Court has jurisdiction of this action by virtue of Title 42, U.S.C., Section 2000e-5(f) and Title 28, U.S.C., Section 1343 (4) providing a cause of action under Title 42, U.S.C., Section 1981.

2. The plaintiffs are employees of the defendant truck line and members of the defendant Union and its affiliates (Local 657 of the Southern Conference of Teamsters and the Interna-

tional Conference of Teamsters), with the exception of the plaintiff, Jesse Rodriguez, who is no longer an employee of the defendant truck line. Plaintiffs are all Mexican-American residents of the United States and residents of San Antonio, Bexar County, Texas. The defendant truck line is a corporation doing business in the State of Texas and the City of San Antonio and operates and maintains a local city-wide freight terminal and a city-wide trucking service in San Antonio, Bexar County, Texas and is an employer within the meaning of Title 42, U.S.C., Section 2000e-(b). The defendant Union and its affiliates are the representatives and bargaining agents of the plaintiff employees on an international, regional and local basis.

3. All plaintiffs were hired by the defendant truck line as regular city pick-up and delivery drivers on the dates set out herein and have remained in that capacity to the present time.

Jesse Rodriguez — Sept. 1965

Modesto Herrera — May, 1965

Sadrach Perez — May, 1959

4. It is stipulated that none of the plaintiff employees were discriminated against as to their original employment.

5. Except for one road driver employed by the Valley Copperstate Sunset Lines, who was transferred from San Antonio, Texas immediately after the merger in 1970 with East Texas Motor Freight, the defendant truck line has never had any road drivers domiciled in San Antonio, Bexar County, Texas and the San Antonio terminal is operated solely as a local, city-wide pick-up and delivery service.

6. It is stipulated that prior to and subsequent to the effective date of Title VII of the 1964 Civil Rights Act to the date that Jesse Rodriguez filed a charge of discrimination with the Equal Employment Opportunity Commission (E.E.O.C.) the defendant truck line had never employed a Negro or Mexican-American as a line driver in the State of Texas covered by the Southern Conference Area Supplemental Agreement.

7. It is stipulated that except for having been received and filed locally by the Terminal Manager Sager in August 1970, the defendant truck line has never considered the written applications for employment as road drivers of the plaintiffs. Such applications were transmitted to the Dallas corporate office of the defendant truck line subsequent to the filing of the E.E.O.C. charges involved herein.

8. It is stipulated that the claim of discrimination of the plaintiffs is solely based upon the fact that after their original employment they have been "locked in" to the lower paying job of city driver and have been denied a job as road driver because:

(a) of the maintenance of separate seniority rosters for city and road drivers;

(b) of the fact that any city driver, regardless of his race, if he transferred from city driver classification to a road driver classification, loses his accumulated city seniority;

(c) the defendant truck line discouraged inquiries from the plaintiffs concerning the qualifications and/or availability of road driver jobs;

(d) the defendant truck line had always employed Anglo/white applicants as road drivers; and

(e) the defendant truck line's policy and practice has been based to a great extent on a word of mouth system. Since the defendant truck line's road drivers and supervisory and terminal personnel are almost exclusively Anglo/white, such a practice has continued the al-

leged illegal exclusion of Mexican-Americans and Negroes as road drivers.

9. It is further stipulated that the only issue presently before the Court pertaining to the defendant truck line is whether or not its failure to consider the plaintiffs' road driver applications constituted a violation of Title VII and 42 U.S.C., Section 1981.

10. On April 1, 1970 the defendant truck line and the defendant Union entered into the National Master Freight Agreement and Southern Conference Area Local Freight Forwarding Pick-up and Delivery Supplemental Agreement (hereinafter referred to as "Union Contract") which expires June 30, 1973 and the terms and conditions of which are fully known and understood by the plaintiff employees. The plaintiff employees have ratified this contract and prior similar contracts since the time of their employment, with the exception of Jesse Rodriguez who voted against ratification of the current contract solely because of the strike and lock-out by the Chicago bargaining unit in the Spring of 1970 and not due to any contract clause made the subject of this suit.

11. The provisions of the Union Contract providing for job transfer from a city driver to a road driver and vice versa, including the provision for separate seniority lists for city and line drivers, apply to all job applicants and employees regardless of race or qualifications, and are not in any way discriminatory.

12. The defendant truck line's policy and regulations regarding job transfers are generally:

(a) The applicant must relinquish his current position;

(b) The applicant must make written application for a new position at terminal location where the job is sought;

(c) The applicant must be willing to re-locate at the new terminal location;

(d) For a road driver job, applicants must pass certain standardized Department of Transportation tests and company tests (driving and physical); and

(e) The applicants must have certain road driving experience.

These regulations are not unreasonable and apply to all job applicants and employees regardless of race or qualifications. It is stipulated that the standards and qualifications of the defendant truck line for its road drivers are not discriminatory. The fact that each terminal is autonomous as concerns the employment of drivers is proper and in accordance with accepted business practices.

13. The plaintiff employees testified that they were unwilling or at least ambivalent to comply with the job transfer requirements even when confronted with a hypothetical opportunity to make the job change under the existing regulations "tomorrow" assuming a position was available. Thus, plaintiffs' objections are not grounded on lack of job availability, but rather on the stringency of the regulations.

14. There has been no showing of discrimination as regards the hiring practices of the San Antonio Terminal office of the defendant truck line.

15. The plaintiff employees have never filed a discrimination grievance charging a violation under Article 38 of the Union Contract, but originally filed a Complaint with the Equal Employment Opportunity Commission.

16. The plaintiff employees have never availed themselves of participating in the contract amendment negotiation meetings at the local Union level in an effort to change the job transfer requirements.

17. The plaintiff employees have not been discriminated against by their Union. The Union is comprised of a majority

of Mexican-Americans and Negroes and every member is free to participate in the contract negotiating process and to vote on every issue or contract presented to the membership.

18. When the plaintiff employees inquired from various supervisory personnel at the San Antonio Terminal as to the method of securing a road driving position, they were not discouraged nor misled, but rather the requirements were explained (i.e. they would have to make application at the road driving terminal location, etc.). The failure of the plaintiff employees to secure a road driving position was due to an unwillingness to give up their city driving seniority and an inability to meet the job qualifications rather than actual racial discrimination by either the defendant truck line or the defendant Union.

19. In January, 1972, the company made the following modification in its no-transfer policy: during a period of 30 days at any terminal where line drivers were domiciled, a city driver could make application for transfer to a line driver's job. He would be given the necessary tests and if he qualified, as a road driver job opened up or became available, he would be permitted to take the job. In effect, the requirement of three years immediate prior line haul road experience was temporarily waived as to such city drivers.

In the area covered by the Southern Conference of Teamsters, there were 202 applications by city drivers. Some of them failed to qualify or to pass the required tests. Some qualified, but did not like over-the-road driving and voluntarily went back to city driving. In the end, only five city drivers successfully made the transition or transfer to over-the-road drivers' jobs. All five of these worked out of the Memphis, Tennessee, terminal.

20. The plaintiff, Jesse Rodriguez, continues in his employment with the defendant truck line as a city driver. His driving

and work record includes numerous accidents (at least three) and at least five injuries.

21. The plaintiff, Modesto Herrera, continues in his employment with the defendant truck line as a city driver. His driving and work record includes at least three accidents, at least seven injuries, much time off because of injuries, and at least four warning letters, three of which involved abnormally low productivity.

22. The plaintiff, Sadrach G. Perez, was employed by the defendant truck line as a city driver until his discharge for cause on May 18, 1971. His driving and work record included the following:

(1) On January 18, 1966 he claimed to have been totally and permanently disabled in an accident in which he hurt his back stacking boxes. In June of 1966 he filed suit in the District Court of Bexar County, Texas, appealing from an award of the Industrial Accident Board and alleging that he was "totally and permanently incapacitated". On July 27, 1966 this suit was voluntarily dismissed. There was no settlement with or payment by ETMF's compensation carrier.

(2) On October 22, 1970 Sadrach G. Perez was given a warning letter by the then terminal manager for violating instructions and a long-standing policy of the terminal.

(3) On January 28, 1971 Perez was dispatched with a shipment to Lackland Air Force Base. The shipment included 471 pieces, totaling 5,133 lbs., with most of the pieces weighing around 11 lbs. and no piece weighing more than 25 lbs.

He complained to the Assistant Terminal Manager Ezra Beierle that the truck in which the merchandise was loaded

did not have a lift gate and wanted to unload the merchandise onto a truck that did have a lift gate. Beierle refused, telling him to proceed with the delivery.

Perez then went to the office of Terminal Manager Asbury and demanded that the truck be unloaded and the merchandise loaded onto one having a lift gate. The argument consumed about 20 minutes. Asbury told him to proceed with the delivery. Perez left with the statement, "I've been too good too long."

He proceeded to Lackland where he took a total of five hours to deliver 5,133 lbs. at one location.

He was given a written reprimand and warning because of the incident.

(4) A few days later, he filed a Workmen's Compensation claim asserting that on the Lackland delivery on January 28, 1971 he injured his left shoulder and upper back and neck.

(5) On January 29, 1971 he was given a written warning notice because of partial absences from work on January 26, 27 and 28.

(6) On March 26, 1971 he was given a warning notice because of his failure to make a delivery on March 24, 1971 at Solo Serve, the warning notice citing other instances in February, 1971 of poor production by him.

(7) On March 26, 1971 he was given a warning notice in connection with a delivery at Sonney Plumbing and Air Conditioning Company. He had unloaded the merchandise on the ground. When the lady in charge, Mrs. Mary Fewell, asked him to place it on the dock, he refused, claiming that the stacking of the merchandise on the ground completed the delivery. Mrs. Fewell wrote a letter to the

company protesting the fact that Perez was disrespectful and discourteous to her.

(8) On May 18, 1971 Perez was dispatched with a load of drugs to the Scobey Warehouse. The boxes had been segregated by numbers in the trailer at the point of origin (Chicago). The instructions to Perez were that he was to load them on pallets at the Scobey Warehouse according to the instructions.

Perez became involved in an argument with the Scobey supervisor about how the pallets were to be delivered to him. Assistant Manager Beierle made a trip to Scobey's to attempt to solve the problems which Perez had created.

Terminal Manager Asbury and Beierle made another trip to Scobey's attempting to solve the problems.

Finally, about 2:45 P.M., Asbury received a call from Chicago in which the shipper complained about the way its merchandise was being handled at Scobey's, Scobey's having apparently reported to the shipper. Perez was ordered to lock the trailer and return to the terminal, where he was discharged by Asbury.

(9) Local Union No. 657 filed a grievance in connection with the discharge which eventually reached arbitration and was heard by the Joint Committee at a meeting in Biloxi, Mississippi. After a full hearing, the committee decided in favor of the company and against Perez (and the Union). At the hearing, evidence was introduced that more than ten (10) customers of the company had given instructions not to send Sadrach Perez back to their places of business, stating that they would refuse the freight if it was to be delivered and would not give up freight if he was to pick it up.

(10) On July 19, 1971 Perez filed a charge with the National Labor Relations Board against the International

Brotherhood of Teamsters alleging a violation of the act in its failure to properly represent him. The Regional Director declined to issue a complaint. Perez appealed to the General Counsel who denied the appeal. Represented by counsel, Perez has a current claim pending before the Industrial Accident Board arising out of the 1971 alleged accident in which he claims that he is totally and permanently disabled, claiming to have a bad back.

23. None of the plaintiff employees could satisfy all of the qualifications for a road driver position according to the company manual due to age or weight or driving record. The qualifications apply universally to all job applicants and employees and are not in any manner racially discriminatory.

24. The driving, work, and/or physical records of the plaintiffs are of such nature that only casual consideration need be given to determine that the plaintiffs cannot qualify to become road drivers. The failure of the defendant truck line to proceed with a detailed, comprehensive consideration of the plaintiffs' applications was for valid business reasons and not because of any discrimination against any of the plaintiffs because of their race or national origin.

25. Both the defendant truck line and the Union defendants are bound by the contracts in that neither can unilaterally change the contract provisions by allowing a merger of seniority lists, a transfer of seniority or in any other manner attempt to alter, combine or discard the provisions of the separate contracts for city and road drivers without subjecting themselves to economic or other negative sanctions by the non-offending party.

26. Refusal by the defendant truck line to permit job transfers without loss of terminal seniority or to maintain separate seniority lists is a reasonable and proper business practice and

in accordance with the Union Contract and in no manner causes, perpetuates or results in discriminatory practices by any of the defendants.

27. The fact that there are separate Union Contracts and job qualifiications for city and road drivers is reasonable both as an accepted business practice and by the fact that the National Labor Relations Board recognizes the two job groups as separate bargaining units.

28. The defendant truck line did not prevent or discourage the plaintiff employees from seeking or securing a road job transfer nor from making written application for said position because of their race or because they filed a Complaint with the Equal Employment Opportunity Commission, or for any other reason.

29. The defendant truck line and Union did not discriminate against the plaintiff employees because they made a charge or indicated they would make a charge against the defendants to the Equal Employment Opportunity Commission.

30. The defendants did not discriminate against the plaintiffs or any other employee or Union member on the basis of race or otherwise.

31. Plaintiffs have at no time moved for a prompt determination of the question of whether or not this cause of action should be maintained as a class action and have offered no credible proof on the question.

32. Plaintiffs have offered no proof of liability or damages as to any class, having confined the evidence, arguments and post trial brief to the individual claims of the named plaintiffs, and having stipulated at the commencement of trial that the only issue before this Court with respect to the defendant truck line involved its failure to consider the individual plaintiffs' applications for employment as road drivers.

33. While not compelling, further evidence of a continuing desire of the majority of the local Union membership is contained in the Affidavit of R. C. Shafer, President and Business Manager of the local Union, and George Hardeman, Jr., Recording Secretary of the local Union, filed February 23, 1973. The parties have stipulated that, if called, these two men would testify that at the Union Membership meeting on February 11, 1973, after the trial of this case was completed, the employees of the defendant truck line, and others, rejected proposals that the next City and road driver contracts be merged and that both job classifications be permitted to transfer to the other with company seniority for all purposes. A further proposal to the effect that the seniority of the employees working for the truck lines remain as it is in the current contracts was approved by a vote in excess of two to one.

Conclusions of Law

1. I conclude as a matter of law that none of the defendants violated Title 42, United States Code, Section 2000e-5 or any section of Title 42 relating to race discrimination.

2. I further conclude that this cause of action is not a proper one for class action and that, therefore, the class action claims in the Complaint should be, and the same are hereby, Dismissed.

3. I further conclude as a matter of law that the plaintiffs, and each of them, take nothing by reason of their suit and that the defendants and each of them are entitled to judgment.

4. I further conclude that the defendants, and each of them, recover their court costs incurred herein against the plaintiffs.

Entered this 22nd day of March, 1973, at San Antonio, Texas.

/s/ JOHN H. WOOD, JR.
United States District Judge

APPENDIX B

Jesse RODRIGUEZ, Sadrach G. Perez and Modesto Herrera, on their own behalf and on behalf of those similarly situated, Plaintiffs-Appellants,

v.

EAST TEXAS MOTOR FREIGHT, Southern Conference of Teamsters and Teamsters Local 657, Defendants-Appellees.

No. 73-2801.

United States Court of Appeals, Fifth Circuit.

Nov. 25, 1974.

Mexican-American city truck drivers brought employment discrimination class action against motor carrier and union organizations challenging carrier's requirement that city drivers resign their jobs before applying for more lucrative road positions and rule preventing city drivers from carrying their seniority to road jobs. The United States District Court for the Western District of Texas, John H. Woods, Jr., J., found that class action was inappropriate and that defendants had not violated civil rights statutes and the plaintiffs appealed. The Court of Appeals, Wisdom, Circuit Judge, held that plaintiffs met class action requirements and could maintain action on behalf of carrier's Mexican-American and Negro city drivers who were included in collective bargaining agreement; that evidence that discrimination had been practiced in the past in hiring of road drivers, that "no transfer" policy and maintenance of separate seniority rosters for city and road drivers perpetuated the past discrimination and that there was no business necessity preclud-

ing hiring of city drivers for road driver positions established that carrier had discriminated against plaintiffs and the plaintiff class; and that participation by union organizations in establishment of separate seniority rosters constituted violation of civil rights statutes.

Reversed and remanded.

1. Federal Civil Procedure Key 161

Class action may not be dismissed because class representatives fail to ask for ruling on propriety of class nature of suit; responsibility for determining propriety of class nature of suit falls to trial court. Fed.Rules Civ.Proc. rule 23(c)(1), 28 U.S.C.A.

2. Federal Civil Procedure Key 184

Plaintiff class representatives who instituted employment discrimination action were required to establish that the action met requirements of class action rule. Fed.Rules Civ.Proc. rule 23 (a), 28 U.S.C.A.

3. Federal Civil Procedure Key 184

Requirements of class action rule must be read liberally in suits brought under equal employment opportunity provisions and equal rights provision of civil rights statutes. Fed.Rules Civ.Proc. rule 23(a), 28 U.S.C.A.; 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

4. Federal Civil Procedure Key 184

Suits brought under equal employment opportunity provisions and equal rights provision of civil rights statutes are inherently

class suits. Fed.Rules Civ.Proc. rule 23(a), 28 U.S.C.A.; 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

5. Federal Civil Procedure Key 184

Discrimination on the basis of race or national origin is a class wrong. Fed.Rules Civ.Proc. rule 23(a), 28 U.S.C.A.; 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

6. Federal Civil Procedure Key 184

Antagonism between Mexican-American city truck drivers, who instituted employment discrimination action challenging policy precluding transfer of city drivers to road driver jobs, and majority of membership of local union with respect to whether separate seniority lists of city and road drivers should be merged did not indicate antagonism with regard to contention that motor carrier and union organizations had discriminatorily excluded minorities from road driver positions and did not preclude maintenance of the action as a class action. Fed.Rules Civ.Proc. rule 23(a), 28 U.S.C.A.; 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

7. Federal Civil Procedure Key 1741

In order to remove possible antagonism between class representatives who instituted employment discrimination action challenging motor carrier's policy precluding transfer of city drivers to more lucrative road driver jobs and some city drivers, trial court could have narrowed class or separated it into subclasses for purposes of relief or could have shaped relief to avoid any injustice to dissenting members and, therefore, antagonism

did not require dismissal of class action. Fed.Rules Civ.Proc. rule 23(a), 28 U.S.C.A.; 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

8. Civil Rights Key 46

District courts have wide discretion in fashioning relief under equal employment opportunity provisions of Civil Rights Act. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

9. Civil Rights Key 46

Flexibility and careful tailoring of judicial decrees in actions brought under equal employment opportunity provisions of Civil Rights Act are the order of the day. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

10. Federal Civil Procedure Key 184

Plaintiffs who instituted employment discrimination action were not required to present more than prima facie case of discrimination against class in order to maintain action as class action. Fed.Rules Civ.Proc. rule 23(a), 28 U.S.C.A.; 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

11. Stipulations Key 14(4)

Plaintiffs who instituted employment discrimination action challenging motor carrier's policy precluding transfer of city drivers to road driver positions did not abandon their class claims by stipulating that the only issue before the court pertaining to the carrier was whether carrier's failure to consider

the city drivers' applications for road driver positions constituted violation of civil rights provisions, as stipulation was apparently made in an attempt to eliminate confusion in exposition of evidence and not to foreclose class issues, plaintiffs continued to proceed as in a class action and such was made clear to trial court and defendants. Fed.Rules Civ.Proc. rule 23(a), 28 U.S.C.A.; 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

12. Federal Civil Procedure Key 1741

Dismissal of employment discrimination action on behalf of class consisting of all Mexican-American and black applicants for road driver positions with motor carrier was not improper as plaintiffs never pursued action on behalf of those individuals; class considered for relief would be defined as all of carrier's Mexican-American and black city drivers who were included in collective bargaining agreement and who were precluded by carrier's policy from transferring to more lucrative road positions. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Fed.Rules Civ.Proc. rules 23, 23(a), (c)(1), 28 U.S.C.A

13. Civil Rights Key 44(1)

Prima facie case of employment discrimination may be established by statistical evidence and statistical evidence alone. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

14. Civil Rights Key 44(1)

Evidence that motor carrier had never employed a Negro or Mexican-American as a road driver in portion of state covered by collective bargaining agreement prior to filing of employ-

ment discrimination charge, that two and one-half years later carrier had hired three Mexican-Americans to join its road driver force of approximately 180 drivers and that carrier had never hired a Negro road driver in the state established prima facie case of past discrimination in hiring. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

15. Civil Rights Key 43

Once plaintiffs who instituted employment discrimination action established prima facie case of past discrimination in hiring, burden fell to defendants to rebut statistics or to explain disparity in hiring. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

16. Civil Rights Key 39

Employer's present hiring practices could neither explain nor justify employer's past discriminatory hiring practices. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

17. Civil Rights Key 43

Absent proof to the contrary, it would be assumed that "lily white"/Anglo nature of motor carrier's road driver force until filing of employment discrimination charge with Equal Employment Opportunity Commission resulted from discriminatory hiring practices. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

18. Stipulations Key 14(10)

Stipulation that plaintiffs had not been discriminated against when they were hired at trucking terminal as city drivers did

not preclude determination that motor carrier engaged in discriminatory practices in hiring drivers for road positions. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

19. Civil Rights Key 44(1)

Proof that relevant labor pool lacks qualified minority persons may, even in a class action, rebut prima facie case of hiring discrimination. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

20. Civil Rights Key 9.10

Equal employment opportunity provisions of Civil Rights Act do not force employers to hire unqualified applicants of any race or ethnic background. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

21. Civil Rights Key 43

Motor carrier against which minority city truck drivers brought employment discrimination action challenging carrier's policy precluding transfer of city drivers to road driver positions had burden of showing that carrier's history of hiring only white/Anglo road drivers resulted from scarcity of available minority persons qualified to serve in position of road driver. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

22. Civil Rights Key 44(1, 4)

Evidence that motor carrier had discriminated in the past in hiring road drivers, that carrier's policy precluding transfer of city drivers to road driver positions and maintenance of sepa-

rate seniority rosters for city and road drivers perpetuated the past discrimination and that there was no business necessity for carrier's "no transfer" policy and seniority system established that carrier had violated equal employment opportunity provisions of Civil Rights Act. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

23. Civil Rights Key 9.10

To justify policy which perpetuates past discriminatory hiring practices on ground of business necessity, business purpose of the policy must be sufficiently compelling to override any racial impact, it must effectively and efficiently carry out its business purpose and there must be no acceptable alternative practice. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

24. Civil Rights Key 9.10

Motor carrier's "no-transfer" policy which precluded transfer by city drivers to more lucrative road driver positions and which perpetuated past discrimination in hiring of road drivers could not be justified under business necessity theory on grounds that policy was necessary to protect employees, property and the general public from unqualified drivers or on ground that majority of blacks and Mexican-Americans of union local comprised of city drivers had rejected proposal to merge city and road seniority rosters and that if it had taken action to merge seniority lines, carrier might have been subject to legal action by those who desired dual lists. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

25. Civil Rights Key 43

Plaintiffs who brought employment discrimination class action challenging motor carrier's policy which precluded transfer

by city drivers to more lucrative road driver positions were not required to prove that class, which was composed of city drivers, contained those qualified to assume road driver responsibilities; carrier had burden of proving that none of the class was qualified to transfer to road driver positions. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

26. Civil Rights Key 9.10

It is discriminatory to require experience as a prerequisite to employment when experience is unavailable to minority persons. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

27. Stipulation Key 14(10)

Stipulation that motor carrier's standards and qualifications for its road drivers were not discriminatory did not constitute waiver of contention, asserted in employment discrimination action brought by minority city drivers who were precluded by carrier's policy from transferring to more lucrative road driver positions, that road driving requirements, including requirement of three years' prior experience as a road driver had a disparate impact and discriminatory effect. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

28. Civil Rights Key 9.11

Discrimination against black and Mexican-American city truck drivers resulting from motor carrier's policy precluding transfer by city drivers to more lucrative road driver positions from which minorities had been excluded in the past was continued and reinforced by union action which resulted in city and road drivers being placed in separate bargaining units with seniorities running from date of entry into the particular unit

and, therefore, union organizations were liable for employment discrimination. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

29. Civil Rights Key 43

Prima facie case of past hiring discrimination and proof that seniority system which was creature of collective bargaining agreement transmitted discrimination into the present shifted burden to union organizations to show that present discriminatory effects were unavoidable and required by business necessity. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

30. Civil Rights Key 9.11

Union organizations could have eliminated "lock-in" effect of separate seniority rosters for city and road truck drivers without merging rosters and jeopardizing seniority rights of city drivers who wished to remain in their positions by allowing seniority carryover on a one-time-only basis for qualified city drivers who wished to transfer to more lucrative road driver positions; thus, union organizations could not escape liability for present discriminatory employment effects of past exclusion of minorities from road driver positions on ground that the discriminatory effects were unavoidable and required as a business necessity. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

31. Civil Rights Key 46

District courts have broad remedial powers to eliminate present effects of past employment discrimination and a large measure of discretion in modeling a decree. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

32. Civil Rights Key 9.10

Those who suffer employment discrimination must be permitted to take their rightful place when job openings develop. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

33. Civil Rights Key 46

Black and Mexican-American city truck drivers, many of whom could have been road drivers but for discrimination with respect to hiring of road drivers, were entitled to opportunity to transfer to road driver positions as such positions developed and could meet experience requirement by showing three years of city driving on equipment similar to that used over the road, notwithstanding employer's rule requiring three years of road driver experience. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

34. Civil Rights Key 46

Fact that not all motor carriers required three years' experience as prerequisite for road driver positions did not require reduction in number of years of experience required by motor carrier as prerequisite for permitting its city drivers, who were victims of past discrimination with respect to hiring for road driver positions, to transfer to position of road driver as, following removal of requirement that prior experience be as a road driver, experience required was not only racially neutral but was neutral in effect. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

35. Civil Rights Key 9.10

Equal employment opportunity provisions of Civil Rights Act were not intended to lead to uniform hiring practices across an industry; so long as hiring policies do not discriminate, the

provisions do not require their modification. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

36. Civil Rights Key 9.13

City truck drivers who were required to be given opportunity to transfer to more lucrative road driver positions from which they had previously been discriminatorily excluded could not be disqualified from road driver positions even if they performed inadequately on road test unless they could not be expected to improve sufficiently given normal training. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

37. Civil Rights Key 46

In employment discrimination action challenging motor carrier's policy against transfer of city truck drivers to road driver positions, trial court's determination that named plaintiffs were unqualified for road driver positions was premature where carrier admitted by stipulation that it had not considered any of the plaintiffs for employment as road drivers. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

38. Civil Rights Key 9.12

Question of how much seniority city truck drivers would be permitted to take with them upon transfer to road driver positions from which they had previously been discriminatorily excluded should be determined by date on which city drivers would have qualified for the road driver positions but for discrimination. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

39. Federal Civil Procedure Key 2397

Judgment by consent binds parties and those in privity with them. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

40. Judgment Key 707
Release Key 27

Consent decree entered in government's "pattern and practice" suit against motor carrier and union organizations challenging discriminatory employment practices which were at issue in subsequently brought private class action did not operate as collateral estoppel to prohibit members of class from participating in relief in the class action where members of the class were neither parties to the government suit nor had interests in privity with the government; however, those members of class accepting compensation under consent decree and signing release would be bound by terms of the release. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

Appeal from the United States District Court for the Western District of Texas.

Before WISDOM, AINSWORTH and GODBOLD, Circuit Judges.

WISDOM, Circuit Judge:

In this employment discrimination case the plaintiffs-appellants attack two ubiquitous practices in the trucking industry: (1) the trucking companies' requirement that "city drivers" resign from their city driver jobs before applying for the more

lucrative and sought-after "road" or "line driver"* positions, and (2) the companies' rule preventing city drivers from carrying their seniority to road driver jobs. The plaintiffs, Mexican-American city drivers for East Texas Motor Freight (ETMF), brought this action below as a class action, contending that these facially neutral practices of ETMF and the defendant union organizations perpetuate the effects of past discriminatory hiring practices and thus violate Title VII of the Civil Rights Act of 1964[1] and 42 U.S.C. § 1981.[2] The district court found

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* The terms "road driver" and "line driver" are used interchangeably throughout this opinion.

[1] (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

. . . . . .

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

42 U.S.C. § 2000e-2.

[2] All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce

that the cause of action was inappropriate for a class action, and that none of the defendants had violated Title VII or Section 1981. We reverse.

I

Facts

In the trucking industry, "road" or "line driver" is considered a separate job classification from "city, pick-up and delivery driver." Road drivers for ETMF drive 10-speed tractors with semitrailers, carrying freight among the 52 ETMF terminals in 19 states. Road drivers work long hours, and often spend long periods of time away from home, but they have the prestige driving job in the trucking industry, and they generally bring home the highest pay. Freight brought to a terminal by a road driver is unloaded and reloaded onto other trucks, either onto another tractor-trailer, or onto a "bobtail", a truck with the body and engine mounted on the same chassis. A city driver then delivers the merchandise locally.

In conformance with the practice in the trucking industry generally, ETMF "domiciles" road drivers at only some of its terminals: those in cities that are relay points equidistant between major centers, and those in "head haul" cities, cities at the end of a line of service that generate a significant amount of freight to other points in the company's system. In Texas ETMF has six terminals that domicile road drivers, and fifteen terminals that do not.[3] ETMF has city drivers at all terminals.

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contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981.

[3] Those terminals domiciling road drivers are: Dallas, El Paso, Longview, Pecos, San Angelo, and Texarkana. Only city drivers are

The primary responsibility for hiring drivers, both city and road, in the ETMF system rests with the manager at the terminal where a vacancy occurs. The manager interviews applicants, reviews their qualifications, and makes recommendations to officials at the corporate headquarters in Dallas. Although the Dallas officials must approve each applicant for employment, the terminal manager makes the affirmative decision to hire. The unions have no responsibility for hiring.

ETMF's qualifications for road drivers are more stringent than for city drivers. City drivers must be at least 21 years old and have at least one year pick-up and delivery experience. Road drivers must be at least 27 years old and have three years "immediate prior line haul road experience". Both city and road drivers face a battery of other requirements involving driving, work, credit, and police records. They must be familiar with Department of Transportation regulations, have a high school education or the equivalent, and hold a valid commercial drivers license. Finally, both city and road drivers must pass physical, written, and driving examinations. Everett E. Cloer, ETMF's Vice President in charge of industrial relations testified to the importance of driving tests for road drivers: "Well, first of all [applicants] are given a 25-mile driving test within the city to see if they can handle the transmissions of this equipment, see what their driving reactions are, et cetera. If they pass that, then they are given an in-cab trip with the supervisor. The supervisor rides with them on a student [over-the-road] trip."[4] Counsel for the parties stipulated that the line driver requirements are nondiscriminatory.

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domiciled at the following terminals: Abilene, Amarillo, Atlanta, Austin, Beaumont, Brownwood, Ft. Worth, Henderson, Houston, Lubbock, Lufkin, Marshall, Odessa, San Antonio, and Tyler.

[4] The importance of road testing as a criterion for hiring road drivers was echoed by Ed A. Asbury, Manager of ETMF's San Antonio terminal. When asked how he would determine whether city drivers were qualified to be road drivers, he answered: "I think

City drivers and road drivers are covered by different collective bargaining agreements. The defendant-appellee Local 657 has a collective bargaining agreement with ETMF covering city drivers at ETMF's San Antonio terminal. Local 657 represents no road drivers of ETMF. The defendant-appellee Southern Conference of Teamsters, a delegate body of the International Brotherhood of Teamsters, Chauffeurs and Warehousemen and Helpers of America, is made up of representatives from the affiliated Locals in ten southern states. Separate collective bargaining agreements for city and road drivers are drawn by the Southern Conference and negotiated by the Conference with trucking company representatives. Then the agreements are passed down to the Locals to be approved and made part of the contracts between the Locals and the trucking companies.

Since 1954 ETMF has followed a "no-transfer" policy, prohibiting the transfer of drivers between city and road driver classifications and between terminals.[5] Under the policy, in order for a city driver to obtain a position as a road driver, he must resign his city driver job and apply for a road driver slot. He thereby forfeits all accumulated seniority. In effect, he stands on no better footing in applying for a road driver job than a complete stranger to the company. For the purposes of strengthening his application, he gains no "credit" for his years as a city driver. And if his bid to be a line driver fails, there is no guarantee that he will be rehired as a city

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I should have to ride with those boys to be able to answer that question. I don't know . . . I would have to—if I were going to make an honest appraisal, I would get out and ride with that man. I would ride with him here in town, and I would ride with him on the freeway. I would ride with him in line haul equipment. I would see what he would do, how he conducted himself, how he handled his equipment."

[5] Road drivers for ETMF presently operate under a "modified" terminal no-transfer policy. If a road driver at one terminal is laid off, he can "bump" a less-senior road driver at another terminal.

driver. ETMF's policy against transfers is complemented by the fact that under collective bargaining contracts between ETMF and Local unions, including the defendant Local 657, city drivers who transfer to the road do not carry over their "competitive-status" seniority, that is, seniority for job bidding and lay off purposes.[6] Under separate collective bargaining agreements for road and city drivers, competitive-status seniority runs from the time an employee enters a particular collective bargaining unit. Transfer is not expressly prohibited, but it is not expressly permitted either, and the agreements have been universally interpreted to prohibit the carryover of seniority from one classification to another.

For thirty days in January and February 1972, to ease morale problems among its city drivers who wanted to become road drivers, ETMF relaxed its no-transfer policy and permitted city drivers to transfer to line jobs, if they could qualify.[7] During this period, although all other requirements were maintained, the requirement of three years line driving experience was waived. The modification did not affect the dual seniority system established by the separate collective bargaining agreements. Any city driver transferring to the road under the modified policy still lost his seniority for job bidding and lay off purposes. Moreover, the one-time-only change in policy opened the possibility of transfer only to those city drivers who worked out of terminals domiciling road drivers; the restrictions on interterminal transfers remained in effect. In the Southern Conference area 220 city drivers showed an interest in transferring under the temporary policy, and 35 to 50 city drivers tried out: five succeeded in transferring to road driver jobs.[8]

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[6] The employee keeps his company seniority for fringe benefit purposes.

[7] Road drivers were also permitted to transfer to the city.

[8] All five of the city drivers to make successful transition to road driver jobs worked out of the Memphis, Tennessee, terminal.

Against the history of these policies must be juxtaposed one crucial set of facts. The parties stipulated that before 1970 East Texas Motor Freight had never employed a black or Mexican-American as a road driver in the Texas-Southern Conference area.[9] ETMF's road driver force in that area numbered approximately 180, all white/anglo drivers. After charges were filed by plaintiff Jesse Rodriguez with the Equal Employment Opportunity Commission (EEOC) on August 20, 1970, the company hired three Mexican-American road drivers in El Paso. By the time of trial, the company had still not hired a single black road driver in Texas. In comparison, approximately 35 percent of ETMF's city drivers in Texas are black or Mexican-American. Of a total of 575 city drivers for ETMF in the state, 111 are Spanish-surnamed, 95 are black, and 369 are anglo.

The three named plaintiffs, Jesse Rodriguez, Sadrach Perez, and Modesto Herrera, are Mexican-American city drivers at ETMF's San Antonio terminal. With the exception of one road driver who temporarily worked out of San Antonio in 1970, ETMF road drivers have never been domiciled in San Antonio. San Antonio city drivers were therefore not able to take advantage of the temporary modification of the no-transfer rule in the winter of 1972. Perez was hired as a city driver in 1959, Herrera was hired in 1964, and Rodriguez was hired in 1965. They stipulated that they were employed at the San Antonio Terminal without regard to race, color, or national orgin. Each is a member of Local 657 and the Southern Conference.

Although none of the named plaintiffs made written application for a line driver job until 1970, Herrera made verbal inquiries about transferring to the road as early as 1965. In 1970 the plaintiffs submitted letters to the San Antonio terminal

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[9] The Southern Conference covers all Teamster members in Texas, except for some in El Paso.

manager, requesting transfer to road driving jobs. The terminal manager received and filed the letters. ETMF stipulated that it never considered these applications for employment as road drivers. On August 20, 1970, Rodriguez filed a written charge with the EEOC complaining that the policies of ETMF, Local 657, and the Southern Conference relegated Mexican-Americans and blacks to city driver jobs. Similar charges were filed by Herrera on March 11, 1971, and by Perez on June 7, 1971. On May 18, 1971, Perez was discharged from his employment with ETMF. The plaintiffs received thirty-day "right-to-sue" letters on October 11 and 13, 1971. On October 26, 1971, the plaintiffs filed this class action suit in district court.

Prior to the trial in this cause, the parties entered into a series of stipulations. In addition to the stipulations already mentioned, the parties agreed to the following:

> The claim of discrimination of the Plaiintiffs is solely based upon the fact that after their original employment, they have been "locked in" to the lower paying job of city driver and denied a job as line driver because of:
>
> (a) The maintenance of separate seniority rosters for city and line drivers;
>
> (b) The fact that any city driver regardless of his race, if he transferred from city driver classification to a road driver classification, loses his accumulated city seniority;
>
> (c) The Defendant East Texas Motor Freight discouraged inquiries from Plaintiffs concerning the qualifications and/or availability of line driving jobs;
>
> (d) The fact that the Defendant East Texas Motor Freight had always employed Anglo/white applicants as road drivers;
>
> (e) That the company's policy and practice of recruiting line or road drivers has been based to a great

> extent on a word of mouth system. Since the company's line drivers and supervisory terminal personnel are almost exclusively Anglo/white, such a practice has continued the alleged illegal exclusion of Mexican-Americans and Negroes as road drivers;
>
> That the only issue presently before the Court pertaining to the company is whether the failure of the Defendant East Texas Motor Freight to consider Plaintiff's line driver applications constituted a violation of Title VII and 42 U.S.C. § 1981.

Over strenuous objection at trial, the district court admitted evidence relating to the qualifications of the named plaintiffs to be road drivers. After trial, the court concluded that none of the named plaintiffs could satisfy all of the road driver requirements "according to the company manual due to age or weight or driving record". Furthermore, the court found, "[t]he driving, work, and/or physical records or the plaintiffs are of such nature that only casual consideration need be given to determine that the plaintiffs cannot qualify to become road drivers". In conclusion, the court found that "[t]he plaintiffs did not discriminate against the plaintiffs or any other employee or union member on the basis of race or otherwise". The plaintiffs appeal. The Equal Employment Opportunity Commission, as amicus curiae, has filed a brief urging reversal of the decision of the district court.

II

The Class Action Claim

The plaintiffs brought this suit "on their own behalf and on behalf of other Mexican-American and black individuals who similarly have been denied equal employment opportunities by the defendants and additionally on behalf of Mexican-American

and black individuals who may, in the future, be denied equal employment opportunities by the defendants because of their national origin and race." They described the class more particularly as "all of defendant East Texas Motor Freight's Mexican-American and black in-city drivers included in the collective bargaining agreement entered into between East Texas Motor Freight and the Southern Conference of Teamsters covering the State of Texas . . . [and as] all Mexican-American and black applicants for line driver positions with East Texas Motor Freight included in the above area covered by the Southern Conference of Teamsters from July 2, 1965, to the present." Neither the plaintiffs nor the defendants moved for a ruling under Fed.R.Civ.P. 23(c)(1) as to whether the suit could be maintained as a class action, and the court made no ruling until after the trial was completed. In its findings the court stated:

> 31. Plaintiffs have at no time moved for a prompt determination of the question of whether or not this cause of action should be maintained as a class action and have offered no credible proof on the question.
>
> 32. Plaintiffs have offered no proof of liability or damages as to any class, having confined the evidence, arguments and post trial brief to the individual claims of the named plaintiffs, and having stipulated at the commencement of trial that the only issue before this Court with respect to the defendant truck line involved its failure to consider the individual plaintiffs' application for employment as road drivers.

Concluding that the cause of action was "not a proper one for class action," the court dismissed the class action claims. In our opinion, the district court's dismissal of the class action was erroneous.

[1] Rule 23(c)(1) provides that "[a]s soon as practicable after the commencement of an action brought as a class action,

the court shall determine by order whether it is to be so maintained." A class action may not be dismissed because the class representatives fail to ask for a ruling on the propriety of the class nature of the suit. That responsibility falls to the court. "The court has an independent obligation to decide whether an action brought on a class basis is to be maintained even if neither of the parties moves for a ruling under subsection (c)(1)." Wright & Miller, Federal Practice and Procedure, Civil § 1785 (1972).

[2-5] The plaintiff class representatives, of course, must establish that the action meets the requirements of Rule 23(a).[10] See Rossin v. Southern Union Gas Co., 10 Cir. 1973, 472 F.2d 707, 712; Johnson v. Georgia Highway Express, Inc., 5 Cir. 1969, 417 F.2d 1122, 1125 (Godbold, J., concurring); 3B J. Moore, Federal Practice ¶ 23.02-2 (2d ed. 1974); Wright & Miller, Civil § 1759 at 578. But the requirements of Rule 23(a) must be read liberally in the context of suits brought under Title VII and Section 1981. See Wright & Miller, Civil § 1771. Suits brought under these provisions are inherently class suits. By definition, discrimination on the basis of race or national origin is a class wrong. Oatis v. Crown Zellerbach Corp., 5 Cir. 1968, 398 F.2d 496, 499. And a suit charging employment discrimination is naturally "a sort of class action for fellow employees similarly situated." Jenkins v. United Gas Corp., 5 Cir. 1968, 400 F.2d 28, 33; see Parham v. Southwestern Telephone Co., 8 Cir. 1970, 433 F.2d 421, 428; cf. Newman v. Piggie Park Enterprises, 1968, 390 U.S. 400, 401-402, 88 S.Ct. 964, 19

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[10] (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23.

L.Ed.2d 1263. When class relief is sought in the complaint, therefore, the court should liberally apply the requirements of Rule 23(a). See Bing v. Roadway Express, Inc., 5 Cir. 1973, 485 F.2d 441, 446; compare Danner v. Phillips Petroleum Co., 5 Cir. 1971, 447 F.2d 159, 164 (class relief not sought in complaint).[11]

[6] There is no serious dispute that the plaintiffs here satisfied the first three criteria in Rule 23(a). The class clearly meets the requirements that the members be so numerous that joinder would be impractical, that there are common questions of law and fact, and that the claims and defenses of the representative parties are typical. The defendants argue strenuously, however, that there was insufficient guarantee that the named parties would "fairly and adequately protect the interests of the class."

The defendants maintain that the named plaintiffs have acted antagonistically to the interests of a majority of Mexican-American and black city drivers. The complaint requests that the court order the city and line driver seniority lists merged to create a single seniority system based solely on the date that an employee first joined the company. The desirability of such relief, argue the defendants, was expressly rejected at a membership meeting of the defendant Local 657 on February 11, 1973, approximately two weeks after the completion of the trial. An affidavit recounting the results of voting at the meeting was admitted into evidence under Fed.R.Civ.P. 59. At the meeting the union members voted 87 to 21 against a proposal that the city and road driver contracts be merged and that city drivers be permitted to transfer to the road while road drivers were permitted to transfer to the city. Of the 138 people present at the meeting, 121 were city pick-up and delivery drivers. Eighty-three were Mexican-American, 42 were Anglo, and 13 were

[11] In *Danner* this Court expressly limited its holding: "All we hold is that class action relief must be predicated upon a proper class action complaint satisfying all the requirements of Rule 23". 447 F.2d at 164 n. 10.

Negro. If all possible Anglo votes were deducted from the total against it, the proposal still would have been rejected by a majority of Mexican-American and Negro votes.

We do not ascribe the significance to the vote that the defendants urge. We cannot tell what assumptions were made implicit. Furthermore, the membership of Local 657, even the Mexican-American and black membership, is far from congruent with the class described in the complaint. The Local's membership is both more restricted and more extensive. The Local draws its membership from the San Antonio area; the complaint covers city drivers throughout Texas. The Local has members who work for trucking firms other than ETMF; the class outlined in the complaint is restricted to employees or applicants of ETMF. The extent to which the vote represents the actual preference of the class, therefore, is unclear.

[7-9] Even taking the results of the vote at face value,[12] we reject the district court's conclusion that there was sufficient reason to dismiss the class action in this case. Especially in light of the fact that the evidence of the union vote was not received until two weeks after the trial, there were two preferable options open to the trial judge. First, he could have shaped the class to remove any possible antagonism between the representatives and some of the city drivers. The court could have

[12] The outcome of the vote is consistent with what one might expect of a vote of ETMF's San Antonio city drivers. Separate seniority rosters in separate contracts prevent laid-off road drivers from bumping less senior city drivers from their jobs. Because ETMF does not domicile road drivers in San Antonio, to take advantage of a merger of seniority rosters and obtain a road job, a San Antonio city driver with ETMF would have to move to another city. Those city drivers who would not desire such a move, or who would not desire to transfer to the road for some other reason, would not gain from a merger of seniority rosters. We note that in a similar case a court has recently refused to order a merger of seniority rosters because to do so would injure those members of the plaintiff class who did not wish to transfer to road driving jobs. Sabala v. Western Gillette, Inc., S.D.Ky. 1973, 362 F.Supp. 1142, 1153.

narrowed the class or separated it into subclasses for purposes of relief. See Oatis v. Crown Zellerbach Corp., 398 F.2d at 499. Or, the court could have shaped the relief to avoid any injustice to the dissenting class members. District courts have wide discretion in fashioning relief under Title VII: Franks v. Bowman Transportation Co., 5 Cir. 1974, 495 F.2d 398, 414; Bing v. Roadway Express, Inc., 485 F.2d at 448-449. And flexibility and careful tailoring of judicial decrees in Title VII cases are the order of the day. See, e. g., Sabala v. Western Gillette, Inc., S.D.Tex. 1973, 362 F.Supp. 1142. The disagreement here concerned only the proper remedy; there was no antagonism with regard to the contention that the defendants practiced discrimination against the plaintiff class. We do not believe that disagreement within the class as to the remedy desired, surfacing so late in the litigation, should have resulted in a dismissal of the class action.

Because the trial was completed before the court made a ruling whether the class action could be maintained, there were involved none of the imponderables that make the decision so difficult early in litigation, and that demand a substantial amount of district court discretion and corresponding appellate deference. See Johnson v. Georgia Highway Express, Inc., 417 F.2d at 1123. We have before us a record of the proceedings, completed as a class action, and we can judge for ourselves the possible effects of any antagonism of interests. We find these effects insubstantial and curable. We conclude that the plaintiffs met the requirements of Rule 23(a) and established a proper class action under Fed.R.Civ.P. 23(b)(2).[13]

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[13] (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

. . . . . .

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole;

Fed.R.Civ.P. 23.

[10, 11] The district court's finding that the plaintiffs offered no proof on the question of liability or damages to any class is clearly erroneous. As we describe more fully below, the plaintiffs entered into evidence statistics sufficient to present a prima facie case of past hiring discrimination, transmitted into the present by the no-transfer rule and separate seniority rosters which "lock" employees into city driver positions and prevent their transfer to road driver status. The plaintiffs further submitted, without objection, detailed information pertaining to all ETMF city drivers including their names, seniority dates, and domiciles. It is true, as the district court noted, that the plaintiffs concentrated at trial on the individual claims of the named plaintiffs. But the plaintiffs were not required to present more than a prima facie case of discrimination against the class. Nor did the plaintiffs effectively abandon their class claims by stipulating that "the only issue presently before the Court pertaining to the company is whether the failure of the Defendant East Texas Motor Freight to consider Plaintiffs' line driver applications constituted a violation of Title VII and 42 U.S.C. § 1981". The stipulation was apparently entered in an attempt to eliminate some confusion in the exposition of evidence at trial, not to foreclose the class issues. The plaintiffs continued to proceed as in a class action. And this was made clear to the trial court and the defendants.[14]

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[14] The following colloquy took place between the trial judge and Mr. Heidelberg, counsel for the plaintiffs:

THE COURT:

I assume, this being a matter before the court, that Mr. Heidelberg probably has in mind using this witness to establish a general practice and to show that this man was similarly treated although he may have no personal complaint. It would merely corroborate the testimony that such a practice exists. For that limited purpose——

MR. HEIDELBERG:

For that purpose and also, Your Honor, it has not been established that this is not a class action. The allegation is made in the complaint and there have been no motions filed. The

[12] To the extent that the district court's finding that the plaintiffs failed "to offer proof of liability or damages as to any class" refers to the class of "all Mexican-American and black applicants for line driver positions with East Texas Motor Freight", the finding is not erroneous. The plaintiffs never pursued the action on behalf of these individuals, and the district court's dismissal of the class action on their behalf was proper. On remand, the class considered for relief should be defined as all of East Texas Motor Freight's Mexican-American and black city drivers included in the collective bargaining agreement entered into between East Texas Motor Freight and the Southern Conference of Teamsters covering the State of Texas.

III

Liability

In the last few years we have seen a large number of suits brought in federal court, attacking facially neutral policies which allegedly discriminate against minority city drivers by perpetuating patterns of discrimination in the hiring of line

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answers of the defendants deny that this is a class action, but of course we maintain that there is class action involved.

THE COURT:

Well, are you contending now as far as this trial is concerned that this is a class action?

MR. HEIDELBERG:

Yes, Your Honor.

THE COURT:

And how many people are you going to try to establish this by?

MR. HEIDELBERG:

As outlined in the complaint, Your Honor, the class would consist of the Mexican-American and black city drivers who are located in the State of Texas covered by the jurisdiction of the Southern Conference Supplemental Agreement.

drivers by private firms in the trucking industry.[15] As the federal courts have thus become familiar with the practices in the trucking industry, a clear pattern has emerged: throughout much of the industry, trucking companies, and the unions representing drivers, have erected barriers to the movement of non-white/non-Anglo workers from pick-up and delivery jobs to the coveted road driver positions. The employment practices attacked in this suit—the no-transfer and seniority policies—are prevalent in the trucking industry. Typically, city drivers are not permitted to transfer to line driver jobs. Where they are, they are not generally permitted to carry over their seniority for job bidding and lay off purposes. The result is, at the very least, a strong disincentive for city drivers to transfer to the road. City drivers are thus effectively "locked in" their city driving jobs with no realistic possibility of transferring to line driving positions. Were there no more to the scenario, of course, the federal courts would likely have no concern; there is nothing per se illegal in no-transfer or separate seniority policies. But, as the courts have noted with some frequency, the policies often operate to perpetuate the effects of hiring discrimination. The overall result is a situation where in many areas of the country blacks and Mexican-Americans serve as city drivers, while road-driver fleets in private trucking firms, at least until very recently, have been virtually all-white/Anglo.[16] Thus it is that facially

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[15] See, e. g., the cases cited in note 17 *infra*.

[16] Two recent studies have confirmed that Negroes and Mexican-Americans have been excluded from line driving jobs. One study found that, nationally, Negroes comprised only 2.4 percent of the over-the-road drivers for private trucking firms in 1968. Firms that employed more than 100 persons had only one-percent Negro road drivers. Leone, The Under-utilization of Negroes as Truck Drivers by For-Hire Motor Carriers, 22 Lab.L.J. 631, 633 (1971). Another Study, covering 329 trucking companies for the year 1970, found that Negroes comprised 2.7 percent of the companies' road drivers. In the same companies, Spanish-surnamed Americans made up only .8 percent of the road drivers. See Nelson, Equal Opportunity in Trucking: An Industry at the Crossroads (GPO 1971).

neutral no-transfer and seniority policies have come under a broad attack, for "[i]t is now beyond cavil that Title VII of the Civil Rights Act of 1964 proscribed employment practices and procedures which, although presently neutral and nondiscriminatory on their face, tend to preserve or continue the effects of past discriminatory practices". United States v. N. L. Industries, Inc., 8 Cir. 1973, 479 F.2d 354, 360. See Griggs v. Duke Power Co., 1971, 401 U.S. 424, 430, 91 S.Ct. 849, 28 L.Ed.2d 158; Pettway v. American Cast Iron Pipe Co., 5 Cir. 1974, 494 F.2d 211, 236; Local 189, United Papermakers & Paperworkers v. United States, 5 Cir. 1969, 416 F.2d 980, 990-991, cert. denied, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100.

A. *Discrimination by East Texas Motor Freight*

We begin by examining the past hiring patterns of ETMF. See United States v. Jacksonville Terminal Co., 5 Cir. 1971, 451 F.2d 418, 450, cert. denied, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815. Although the plaintiffs do not attack ETMF's road-driver hiring practices—and indeed stipulated that they are not now discriminatory—we must begin there. A pattern of past discriminatory hiring is essential to the plaintiffs' case. See Jones v. Lee Way Motor Freight, Inc., 10 Cir. 1970, 431 F.2d 245, 247, cert. denied, 401 U.S. 954, 91 S.Ct. 972, 28 L.Ed.2d 237.

[13, 14] A prima facie case of discrimination may be established by statistical evidence, and statistical evidence alone. "The inference [of discrimination] arises from the statistics themselves and no other evidence is required to support the inference." United States v. Hayes International Corp., 5 Cir. 1972, 456 F.2d 112, 120. The statistics in the instant case are overpowering. East Texas Motor Freight has stipulated that prior to the date that Rodriguez filed a charge of discrimination with

the EEOC in 1970, ETMF had never employed a Negro or Mexican-American as a line driver in that portion of the State of Texas covered by the Southern Conference Area Supplemental Agreement. By the date of trial, two and a half years later, ETMF had hired three Mexican-Americans to join its Texas road driver force of approximately 180 drivers. By trial ETMF had still not hired a Negro road driver in Texas.

These figures establish a prima facie case of past discrimination in hiring. In other trucking cases the statistics have shown a similar pattern. In Jones v. Lee Way Motor Freight, Inc., 10 Cir. 1970, 431 F.2d 245, 247, for example, the Court summarized: "[T]here were no Negro line drivers; most whites were line drivers; and all Negroes were city drivers." Similarly, in Bing v. Roadway Express, Inc., 5 Cir. 1971, 444 F.2d 687, 688, the Court noted: "All road drivers are, and always have been white; all Negro drivers are city drivers, though not all city drivers are Negro." The similarity between the employment situations in both *Bing* and *Jones* and that here is striking. In *Bing* and *Jones*, and in each of the cases cited in the margin, the court held that the statistics were sufficiently potent to constitute a prima facie case.[17]

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[17] Thornton v. East Texas Motor Freight, 6 Cir. 1974, 497 F.2d 416 (At ETMF's Memphis terminal, all of the 105 road drivers were white. Of the 131 city drivers, 43 were black.); Witherspoon v. Mercury Freight Lines, Inc., 5 Cir., 1972, 457 F.2d 496 (No black had ever worked for Mercury Freight as a long haul driver.); Hariston v. McLean Trucking Co., M.D.N.C. 1973, 62 F.R.D. 642 (Of 479 over-the-road drivers at Winston-Salem terminal, nine were black.); United States v. Navajo Freight Lines, Inc., C.D.Calif. 1973, 6 FEP Cases 274 (No black or Spanish-surnamed road drivers until 1970); Sabala v. Western Gillette, Inc., S.D.Tex. 1973, 362 F.Supp. 1142 (Of 29 road drivers in Houston, 28 were white/anglo; one was Mexican-American. Of 65 drivers in Houston, 42 were either black or Mexican-American.); United States v. Lee Way Motor Freight, Inc., W.D.Okl. 1973, 7 EPD ¶ 9066 (940 road drivers were white, 14 were black, and 12 were other than white or black.); Sagers v. Yellow Freight System, Inc., N.D.Ga. 1972, 6 EPD ¶ 885 (In 1968 of 150 road drivers for Yellow Freight in the Southern Conference area, none were black. As of May 12, 1972, only 3.6 of Yellow Freight's road drivers in the Southern Conference Area were black).

[15] Once the plaintiffs established a prima facie case, the burden fell to the defendants to rebut the statistics or to explain the disparity in hiring.[18] See Rowe v. General Motors Corp., 5 Cir. 1972, 457 F.2d 348, 358. Having stipulated to the statistics, the defendants cannot, of course, dispute them. But the defendants do imply that the force of the statistical disparity is countered by the plaintiffs' stipulations that ETMF's qualification for road drivers are not discriminatory and that the plaintiffs were employed at the San Antonio terminal without regard to race or national origin. The defendants also argue that the plaintiffs have not shown that any members of the plaintiff class were qualified as road drivers. We reject these contentions.

[16, 17] First, only historical hiring practices are at issue here. Whatever the nature of present hiring practices,[19] they neither explain nor justify, without more, the past failure to hire minority line drivers. Without some proof presented by the defendants to the contrary, we must assume that the "lily white"/Anglo nature of the ETMF road driver fleet until 1970 resulted from discriminatory hiring practices.

[18] Second, we accord no weight to the stipulation that the named plaintiffs were not discriminated against when they were hired at the San Antonio terminal as *city* drivers. It was their inability to gain a *road* driver job with ETMF at any terminal in Texas that the plaintiffs decry.

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[18] Although the union defendants are not responsible for ETMF's hiring policies, the case against the unions, like that against ETMF, begins with the showing of past hiring discrimination that originally operated to foreclose the road driver jobs to blacks and Mexican-Americans. See p. 1282, *infra*. The unions thus join ETMF in its effort to rebut the prima facie case of hiring discrimination.

[19] We do not accord the plaintiff's stipulation concerning present hiring practices the broad reading that the defendants do. See p. 1277, *infra*.

Finally, the defendants rely on language from McDonnell Douglas Corp v. Green, 1973, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668, in which the Court said:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Nothing in this language is inconsistent with the accepted practice of federal courts' recognizing statistics as establishing prima facie case of employment discrimination. Sagers v. Yellow Freight System, N.D.Ga. 1973, 5 EPD ¶ 8885 at 5759. In *McDonnell Douglas* a black worker, laid off in a reduction-in-force, complained that he was not rehired because of his race and involvement in the civil rights movement. The Court emphasized that the "critical issue . . . concerns the order and allocation of proof in a private [*non-class-action*] challenging employment discrimination". 411 U.S. at 800, 93 S.Ct. at 1823. (emphasis supplied). Furthermore, the Court observed in a crucial footnote that the test outlined in the text of the opinion for a prima facie case "is not necessarily applicable in every respect to differing factual situations". 411 U.S. at 802. n. 13, 93 S.Ct. at 1824.

The present case differs in several significant respects from *McDonnell Douglas*. First, this is a class action. Equally important, the Supreme Court noted in *McDonnell Douglas* no history of past employment discrimination or any other factor that might have discouraged the respondent from applying for a job. Indeed, he had had a job with the company, and its

refusal to rehire him after his layoff formed the gravamen of the complaint. In contrast, at the time of Rodriguez's complaint to the EEOC, ETMF had never hired a black or Mexican-American line driver in the Texas-Southern Conference area. Given these past hiring practices, "it is not unreasonable to assume that minority persons [would] . . . be reluctant to apply for employment, absent some positive assurance that if qualified, they [would] in fact be hired on a more than token basis". Carter v. Gallagher, 8 Cir. 1972, 452 F.2d 315, 331 (en banc). It would be unrealistic to require the plaintiffs to show that blacks and Mexican-Americans applied for road driver jobs they knew they could not obtain. See Bing v. Roadway Express, Inc., 485 F.2d at 451; Jones v. Lee Way Motor Freight, Inc., 431 F.2d at 247. We note also another distinction. In *McDonnell Douglas* the respondent's qualifications were undisputed. He had held the job, and apparently served satisfactorily, before he was laid off. In the instant case, in contrast, the possibility of meeting one of the most important criteria for hiring—the road test—has been denied to the class of city drivers. Deprived of the opportunity to take a driving test, the plaintiffs could not prove they were qualified to become road drivers.

[19-22] Proof that the relevant labor pool lacks qualified minority persons may, of course, even in a class action, rebut a prima facie case of hiring discrimination. Congress did not intend that Title VII force employers to hire unqualified applicants of *any* race or ethnic background. Griggs v. Duke Power Co., 410 U.S. at 430, 91 S.Ct. 849; Sagers v. Yellow Freight System, Inc., 5 EPD at 5758. But it was EMF's burden to show that its history of hiring only white/Anglo line drivers resulted from a scarcity of available Negroes and Mexican-Americans qualified to serve in that position. United States v. Hayes International Corp., 456 F.2d at 120. ETMF has not met this burden.

The next steps in our analysis were clearly delineated by Judge Thornberry in *Bing:* "Once it had been established that an employer or union has discriminated in the past, then, the inquiry is twofold: (1) Does the present policy perpetuate the past discrimination? (2) Is the present policy justified by a showing of business necessity?" 444 F.2d at 690.

The conclusion is inescapable that both the no-transfer policy and the maintenance of dual seniority rosters, one for city drivers and one for line drivers, have perpetuated ETMF's past discriminatory hiring practices. Together, they have removed all realistic opportunity for transfer. Under the no-transfer policy a city driver wishing to transfer to road status must first resign his city driver position, with no assurance that he will be hired as a line driver, and no assurance that if he fails to be hired he will be rehired as a city driver. Even if the city driver were to become a road driver, because of the separate seniority rosters he would lose his accumulated competitive-status seniority. He would have the last choice of routes and would be the first laid off. And if laid off, he would have no "bumping" rights to recover his city driver job. "In any industry loss of seniority is a critical inhibition to transfer." 451 F.2d at 453. It is no surprise, then, that when the company temporarily relaxed in 1972 its no-transfer policy and its requirement that road drivers have three years line haul experience only five ETMF city drivers in the entire Southern Conference area took, qualified for, and held the road driver job. For a city driver with a significant amount of seniority the choice must have been a difficult one indeed. The named plaintiffs testified that they were unwilling to give up their city driving seniority to transfer to road driving jobs they otherwise desired. In the strictest sense, city drivers were "locked" into city driving jobs. The discrimination that removed the possibility that a Mexican-American or Negro could obtain a line driver job when first applying to the company was thus continued and perpetuated by the no-

transfer and seniority policies which prevented the city drivers from later transferring to road driver jobs.

We turn to the question whether ETMF has justified the no-transfer policy and seniority system by a showing of business necessity. The business necessity standard is strict.

> "[T]he 'business necessity' doctrine must mean more than transfer and seniority policies serve legitimate management functions. Otherwise, all but the most blatantly discriminatory plans would be excused even if they perpetuated the effects of past discrimination. . . . Necessity connotes an irresistable demand. To be preserved, the seniority and transfer system must not only directly foster safety and efficiency of a plant, but also be essential to those goals. . . . If the legitimate ends of safety and efficiency can be served by a reasonably available alternative system with less discriminatory effects, then the present policies may not be continued."

United States v. Bethlehem Steel Corp., 2 Cir. 1971, 446 F.2d 652, 662, cert. denied, 404 U.S. 959. "In other words, management convenience and business necessity are not synonymous." United States v. Jacksonville Terminal Co., 451 F.2d at 451.

[23] The business necessity test essentially involves balancing the need for the challenged practice or policy against its discriminatory impact. The business purpose must be "sufficiently compelling to override any racial impact"; it must "effectively and efficiently" carry out its business purpose; and there must be no acceptable alternative practice. Pettway v. American Cast Iron Pipe Co., 494 F.2d at 246; Robinson v. Lorillard Corp., 4 Cir. 1971, 444 F.2d 791, 798, cert. denied, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655.

[24] ETMF advances two justifications for its no-transfer policy. The company first contends that the no-transfer policy

is necessary to protect employees, property, and the general public. ETMF conjures up visions of an unqualified driver "hurtling through space, if you will, at 60 miles an hour with a rig of gross vehicle weight of 72,000 [pounds]".[20] While we do not underestimate the potential dangers raised by unqualified drivers, these can be effectively diminished and by carefully screening transferees.[21] See Thornton v. East Texas Motor Freight, 6 Cir. 1974, 497 F.2d 416; Bing v. Roadway Express, Inc., 444 F.2d at 691. The visions invoked by ETMF argue for continued strict qualifications for road drivers, but they are not sufficient justification for the no-transfer policy. Second, ETMF argues that as a driver-salesman the city driver's contact with customers is an important element in customer relations. The implication is that if city drivers are permitted to transfer, ETMF might lose customers. We must reject this contention also. Loss of city drivers by transfer is no more harmful to the company's pick-up and delivery business than loss for any other reason. We agree with the district court in Sagers v. Yellow Freight System, Inc., 6 EPD at 5760:

> The city driver's unique functions and skills may justify treating it as a separate job classification from that of road driver; it does not constitute an overriding business justification for denying qualified city drivers the opportunity to transfer to the road driver position where the latter position was initially closed to them on the case of race.

ETMF portrays its seniority system as preferred by the majority of black and Mexican-American city drivers. The company relies on the vote taken at the membership meeting of Local 657 where a majority of the blacks and Mexican-Amer-

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[20] Brief for Appellee East Texas Motor Freight 33, quoting testimony of H. L. Johnson, President of ETMF.

[21] ETMF has a continuous training program for road drivers, which includes on-the-job training. The training program was accelerated after the no-transfer system was temporarily modified in 1972.

icans rejected a proposal to merge city and road seniority rosters. "It is obviously good personnel management", argues ETMF, to honor the preference of its Mexican-American and black employees. Furthermore, the company hints, if it had acted to merge the seniority lines, it might have been subject to legal action by those blacks and Mexican-Americans who desired dual lists, contending that the merger constituted a violation of Title VII. See Graham v. Missouri-Pacific Truck Lines, S.D.Tex.1973, [C.A. 71-11-1229, Feb. 2, 1973]. Whatever the merits of this argument as is couched by ETMF, when relief is viewed in terms other than a merger of seniority lines, such as a once-only transfer by city drivers to line jobs with seniority carryover, any force behind the contention evaporates. ETMF's explanations do not meet the question why those blacks and Mexican-Americans who have desired to transfer have not been permitted to do so and to carry over their competitive-status seniority. Nor is it explained how permitting those city drivers to carry over their seniority would hurt other city drivers or be objectionable to them.[22]

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[22] ETMF might have argued that to permit city drivers to carry over their seniority to road driver jobs would have been in violation of its contract with the local unions representing the line drivers, not parties to this case. Certainly the company might have anticipated some difficulty from those quarters, for permitting carryover of seniority into road jobs would put transferees ahead of some road drivers in seniority. Neither the threat of union difficulty nor the possibility that giving transferees seniority on the road driver roster would violate ETMF's contract with the road driver locals, however, would have provided a sufficient justification for refusing to give transferees seniority. Labor unrest stemming from interference with the expectations of whites was found not to amount to a business necessity in United States v. Bethlehem Steel Corp., 2 Cir. 1971, 446 F.2d 652, Robinson v. Lorillard Corp., 4 Cir. 1971, 444 F.2d 791, 798-799 and Local 189, United Papermakers and Paperworkers, 5 Cir. 1969, 416 F.2d 989. Furthermore, difficulties caused by the fact that city and road drivers were covered by different union contracts was rejected as a business necessity in Bing v. Roadway Express, Inc., 5 Cir. 1971, 444 F.2d 687, 691, and Jones v. Lee Way Motor Freight, Inc., 10 Cir. 1970, 431 F.2d 245, 250.

[25] The company finally contends that the plaintiffs have nevertheless failed to establish liability, because they have not shown that any of the plaintiff class meets ETMF's road driver qualifications. The argument is in essence that if members of the plaintiff class of city drivers cannot qualify for road driver jobs, how can it be said that it is the no-transfer and seniority policies that lock them in city jobs? Rather, the argument continues, city drivers are locked in by their inability to qualify for the sought-after line driver jobs, and ETMF is under no obligation to permit city drivers to transfer to line driver jobs for which they are unqualified.

ETMF would have us reverse the burden of proof, placed firmly on the defendant by the plaintiffs' prima facie case of past hiring discrimination perpetuated by facially neutral practices and policies. We stated earlier that the burden rested on the defendants to show that the failure to hire minority persons as road drivers resulted from an absence of qualified minority drivers available. So too we think the burden must remain on the defendants to prove that the discrimination shown by the plaintiffs' prima facie case is not perpetuated by present policies in that no minority city drivers are now qualified to transfer to road driver jobs. To our knowledge no court has hinged a finding of liability in a trucking case on proof that the plaintiff class of city drivers contains those qualified to assume road driver responsibilities. That some of the class will be found qualified to transfer when the discriminatory restrictions are removed has been uniformly assumed. Winnowing the qualified from the unqualified has been left to the remedy stage; only those city drivers wishing to transfer who meet objective and nondiscriminatory standards of the company are, in the final analysis, entitled to relief.

We agree with this approach. It is not the failure to hire as a line driver every city driver who would like to transfer to the road that forms the gist of the complaint in cases like the

one before us. It is the policies of the company which discourage and prevent transfer regardless of qualifications that are under attack. In sum, we are of the opinion that ETMF had the burden of proving that none of the plaintiff class was qualified to transfer to the road.[23] It was not the burden of members of the plaintiff class to establish their qualifications before a case of discrimination could be made.

We recognize that by a literal reading of ETMF's road driver requirements, none of the plaintiff class of city drivers could qualify for a road driver job. No present city driver has three years' "*immediate* prior line haul experience". Nor, we assume, do many city drivers have three years' experience on the road, gained at any time; the spate of trucking cases that have been marched through the federal courts give clear indication of the difficulty that blacks and Mexican-Americans have had nationwide obtaining road driver jobs with private trucking firms. We do not, however, accept the criteria ETMF employs in determining whom to hire as road drivers. ETMF's road driver requirements must be read against the business necessity test. That standard, always stringent, requires that we scrutinize requirements of experience when that experience has been discriminatorily denied.

[26] Although requiring experience at a particular job is neutral and job-related on its face see Developments in the Law-Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv.L.Rev. 1109, 1145 (1971), it is discriminatory to require experience as a prerequisite to employment when the experience is unavailable to minority persons. Blumrosen, Seniority and Equal Opportunity: A Glimmer of Hope, 23 Rut.L.Rev. 268, 309 (1969). We have in this Circuit approved a lower court's striking down an experience requirement as a criterion of membership in a labor union when "negroes were prevented from gaining such experience due to the union's racial discrimination". Local 53, International Association of Heat & Frost Insulators & Asbestos Workers v. Vogler, 5 Cir. 1969, 407 F.2d 1047, 1054-1055; see also United States v. Sheet Metal Workers, Local 36, 8 Cir. 1969, 416 F.2d 123; Dobbins v. Local 212, International Brotherhood of Electrical Workers, S.D.Ohio 1968, 292 F.Supp. 413. More significantly, we held in United States v. Jacksonville Terminal Co., 451 F.2d at 453, that where blacks were prevented by racial discrimination from utilizing their skills in the railroad industry, experience as a job criterion could not properly be confined to *railroad* experience. We do not imply that all experience requirements that act to perpetuate discrimination are illegal; only that they are illegal unless justified as a business necessity. And, as we have said, ETMF has not proved that three years' immediate line-haul experience is a business necessity for transfer of its city drivers to line-haul duties.

[23] Ezra Bierle, dock foreman at ETMF's San Antonio terminal, testified that from 1968 or 1969 the tractor-trailer equipment driven by city and road drivers has been essentially the same.

[27] The defendants place great reliance on the plaintiffs' stipulation that "[t]he standards and qualifications of East Texas Motor Freight for its road drivers are not discriminatory". The defendants argue that, rather than conceding only that the criteria are facially neutral, the stipulation waived any argument that the road driving requirements have a disparate impact and discriminatory effect. We do not accord the stipulation such a prominent position in this suit. As we have noted, ETMF's criteria for road drivers automatically exclude all members of the plaintiff class, including the named plaintiffs. No city driver now employed can have three years' *immediate* prior line haul experience. And none of the named plaintiffs, at least, has three years' experience road driving gained at any time. By the defendants' reading of the stipulation, therefore, the plaintiffs have disqualified themselves from the very relief they seek most urgently—transfer to road driver jobs. We cannot accept the interpretation that the plaintiffs, represented by

counsel conceded by the defendants to be experienced Title VII attorneys, stipulated away their right to relief on the eve of trial.

In conclusion, the plaintiffs established an unrebutted prima facie case against ETMF of past hiring discrimination. It is manifest that the harmful effects of this past discrimination have been transported into the present through ETMF's facially neutral no-transfer and seniority policies. No compelling business necessity has been offered to justify ETMF's policies. In our view the district court's finding that ETMF did not discriminate against the named plaintiffs, or by implication the plaintiff class, is clearly erroneous. ETMF must be held to have violated 42 U.S.C. § 2000e-2[24] and 42 U.S.C. § 1981.[25]

B. *Discrimination by Local 657 and the Southern Conference*

The plaintiffs contend also that Local 657 and the Southern Conference of Teamsters have acted to perpetuate the discrimination against the plaintiff class of city drivers by creating collective bargaining agreements that establish separate seniority rosters for road and city drivers without provision for seniority carryover for minority city drivers who desire to transfer to road jobs. Before examining the substance of this contention, we pause to outline in more detail the manner in which the collective bargaining agreement between ETMF and Local 657 came into being.

Although the collective bargaining agreement is a contract between ETMF and Local 657, it is the product of negotiation on a national and regional scale. First, there is the National Master Freight Agreement, negotiated on a nationwide basis between the Trucking Employers, Inc. and the National Ovor-the-Road and City Cartage policy and Negotiating Committee

[24] See note 1, *supra*.

[25] See note 2, *supra*.

of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. The National Negotiating Committee represents the local unions; the locals give powers of attorney to permit the National Negotiating Committee to act on their behalf. Although the Master Agreement must be ratified by the locals, ratification is generally a formality. Once the agreement is accepted by a majority of the local unions, it goes into effect and binds all locals.[26] The Master Agreement covers both city and road drivers. Then there are the Supplemental Agreements. Like the Master Agreement, although Supplemental Agreements are signed and administered by each local union at each terminal, "they are negotiated on an areawide basis by Local representatives of employees of all unionized trucking companies in that area". United States v. Pilot Freight Carriers, Inc., M.D.N.C. 1972, 54 F.R.D. 519, 521. In our case the Supplemental Agreements were negotiated by the Southern Conference of Teamsters. From these negotiations came, so far as we are now concerned, two separate agreements, one covering road drivers and one covering city drivers. The agreements provide for seniority to run from the date of entry into a particular collective bargaining unit. At the terminal level, these separate agreements are administered by union locals. In the case before us, the city drivers for ETMF in San Antonio are represented by Local 657. Local 657 is an integrated union. Since 1952 a majority of the employees working for ETMF within the jurisdiction and membership of Local 657 have been blacks and Mexican-Americans.

[28] As we mentioned earlier, it is the creation and maintenance of separate seniority rosters for road and city drivers

[26] International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Constitution, art. XVI, § 4 (1966). "While there is a separate formal contract between each local union and [the defendant company] in effect, the National Master Freight Agreement is published in pamphlet form and accepted nationwide, with a blank in which the number of each individual local union is inserted." Sagers v. Yellow Freight System, Inc., N.D. Ga. 1972, 58 F.R.D. 54, 57.

without provision for seniority carryover by minority city drivers that forms the crux of the complaint against the union defendants. We agree with the plaintiffs that the discrimination against the black and Mexican-American city drivers that closed out the possibility of their being hired originally as road drivers was continued and reinforced by union action and inaction. For their role in continuing the effects of this discrimination the union defendants must share the blame and the liability.

We recognize that the prima facie case against ETMF for discrimination in the hiring of road drivers falls only indirectly against the union defendants. The company has always exercised full responsibility for hiring; the unions have never exercised any. We have discussed how the inability of city drivers to carry over their competitive-status seniority formed an important link in the chain that "locked" minority drivers into city driver jobs. Of this the unions were not aware. Local 657 concedes in its brief that the "most important thing to an employee working under a collective bargaining agreement, except perhaps for wage rates, is his seniority".[27]

[29] The plaintiffs' prima facie case of hiring discrimination, and proof that the seniority system, a creature of the collective bargaining agreement, transmitted the discrimination into the present, shifted the burden to the defendant unions to show that the present discriminatory effects were unavoidable, that is, required as a business necessity.

[30] The primary justification offered by the union defendants is that in contributing to the establishment of separate seniority rosters they were merely following the desires of the majority of their black and Mexican-American members. Once again the defendants rely on the post-trial defeat by members of Local 657 of a proposal to merge city and road driver contracts as an indication of the preferences of a majority of Mexi-

[27] Brief for Appellee Teamsters Local Union 657, at 16.

can-American and black city drivers. As we mentioned earlier, the degree to which the vote should be taken to represent the true desires of members of the plaintiff class is uncertain. In any event, the unions perceive their responsibility too narrowly. There are established ways to eliminate the lock-in effect of separate seniority rosters without merging rosters and jeopardizing the seniority rights of those city drivers who remain in their positions. Most obviously, seniority carryover can be allowed on a one-time-only basis for qualified minority city drivers who wish to transfer to the road. See, e.g., Thornton v. East Texas Motor Freight, supra; Bing v. Roadway Express, Inc., 485 F.2d 441; United States v. Central Motor Lines, Inc., W.D.N.C. 1971, 338 F.Supp. 532. No reciprocal arrangement for road drivers would have been necessary, because they have suffered no discrimination. See United States v. Chesapeake & Ohio Ry Co., 4 Cir. 1972, 471 F.2d 582, 593. We believe a one-time-only transfer with seniority carryover was an alternative that could have eased the discriminatory effects of the separate seniority lists without injury to any minority city driver. This reasonable alternative vitiates the business necessity defense. See United States v. St. Louis-San Francisco Railway Co., 464 F.2d 301 at 308; Robinson v. Lorillard Corp., 444 F.2d at 798.

For their role in establishing separate seniority rosters that failed to make allowance for minority city drivers who had been discriminatorily relegated to city driver jobs, Local 657 and The Southern Conference must be held accountable. They have violated 42 U.S.C. § 2000e-2 and 42 U.S.C. § 1981. The district court's finding to the contrary is clearly erroneous.

IV

Remedy

A. *Transfer*

[31] Because the district court concluded that the defendants were not liable under Title VII or 42 U.S.C. § 1981, it never reached the question of remedy. We remand for the court's consideration of this issue. The district courts have broad remedial powers to eliminate the present effects of past discrimination, and a large measure of discretion in modeling a decree. Local 53, International Heat & Frost Insulators & Asbestos Workers v. Vogler, 407 F.2d at 1052. The discretion is not unbridled, however, and we provide the boundaries within which the decree in this case must be drawn.

[32, 33] We have long subscribed in this circuit to the theory that those who suffer discrimination under Title VII must be permitted to take their "rightful place" when job openings develop. As we said in Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d at 988:

> The Act should be construed to prohibit the *future* awarding of vacant jobs on the basis of a seniority system that "locks in" prior racial classification. White incumbent workers should not be bumped out of their *present* positions by Negroes with greater plant seniority; plant seniority should be asserted only with respect to new job openings. This solution accords with the purpose and history of the legislation.

See Note, Title VII, Seniority Discrimination, and the Incumbent Negro, 80 Harv.L.Rev. 1260 (1967). Thus, black and Mexican-American city drivers, many of whom would now be road drivers but for the discrimination of the defendants, must be given an opportunity to transfer to the road as road driving job openings develop.

ETMF need not permit unqualified plaintiffs to transfer to the road, but in determining who is qualified ETMF must use criteria that either have no disparate impact along the lines of race or national original, or that can be justified as a business necessity. We have already stated that the requirement of three years prior road haul experience must give way. Because road driving experience has been denied to blacks and Mexican-Americans as a class, and because ETMF has not justified the experience requirement as essential, it may not be confined to road driving when to do so would discriminate against members of the plaintiff class. ETMF having failed to prove that three years' line-haul experience is a business necessity for transfer, each city driver must be considered to meet the experience requirement by showing three years of city driving on equipment similar to that used over the road.

[34, 35] The plaintiffs argue that, because not all trucking companies require three years experience, we should also reduce the number of years experience required. See, e. g., Bing v. Roadway Express, Inc., 485 F.2d 441 (1 year); Sayers v. Yellow Freight System, Inc., N.D.Ga. 1973, 6 EPD ¶ 8885 (2 years). Once the requirement of *road* experience is removed, however, the experience requirement is not only *facially neutral*, it is *neutral in effect*. Thus it need not be justified as a business necessity. Congress did not intend that Title VII lead to uniform hiring practices across an industry. So long as hiring policies do not discriminate, Title II does not require their modification.

[36] We hold, not that all minority city drivers with three years' experience at city driving must be permitted to transfer, but only that they may not be excluded unless they fail to meet other qualifications that either have no disparate impact along racial or national-origin lines or that can be justified as essential for safety or efficiency. On remand the district court

should monitor carefully the criteria used by ETMF to prevent minority city drivers from transferring to line driving jobs.[28]

To permit minority city drivers the opportunity to return to their "rightful place" in the road driver ranks, the plaintiff class should be divided into sub-classes, one for each terminal in the Texas-Southern Conference area where ETMF domiciles road drivers. ETMF's system of terminal-based responsibility for hiring and of domiciling road drivers only at certain terminals is not discriminatory, and we leave these practices intact. Still, we are not blind to the recognized mobility of today's minorities. See, e. g., Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 at 1371. We may not assume that blacks and Mexican-Americans who became city drivers at a terminal where road drivers were not domiciled would not have moved to a terminal where road drivers were domiciled had a road driver job been open to them. Therefore, those members of the class who now work in terminals where road drivers are not domiciled must be permitted to join the sub-class of their choice. In other words, they must be provided an opportunity to become road drivers at one of the terminals where ETMF domiciles road drivers. Black and Mexican-American city drivers at terminals where road drivers are domiciled should be placed in the sub-class corresponding to that terminal. We may assume that they are already at the terminal they would have chosen had road driver jobs been open to them in the past.

Within each sub-class, minority city drivers should be permitted the opportunity to transfer as jobs become vacant at

[28] While the in-cab road test is undoubtedly a legitimate method for determining the qualifications of a driver, it may be subject to abuse unless the chances of a subjective judgment by the tester are minimized. See, e. g., United States v. Central Motor Lines, Inc., W.D.N.C. 1971, 338 F.Supp. 532, 563. Moreover, a potential transferee who performs inadequately on this test should not be disqualified unless he cannot be expected to improve sufficiently given normal training.

that terminal. The minority city drivers should be ranked in the various sub-classes according to their "qualification dates", described below. The ranking should determine the order in which opportunities to transfer are awarded.

[37] Over objection at trial, the district court admitted evidence pertaining to the qualifications of the named plaintiffs to become road drivers. The court then found that Rodriguez, Perez, and Herrera were unqualified. In light of the fact that the company admitted by stipulation that it did not consider any of the plaintiffs for employment as road drivers, we believe that the district court's action was premature. The question with regard to the named plaintiffs was not whether they were qualified, but whether ETMF's failure to consider their applications was discriminatory. On remand, the district court should require ETMF to consider the plaintiffs for road driver positions as vacancies occur. The court should supervise carefully the standards used by ETMF to determine whether the plaintiffs are in fact qualified, and should view with particular skepticism any reliance by ETMF on disciplinary actions taken by the company after the plaintiffs initiated their actions with the EEOC.

B. *Seniority Carryover*

[38] Members of the plaintiff class who transfer to the road must be permitted to take with them seniority for job bidding and lay off purposes. The question is "how much?" In general terms, the answer is that "how much seniority the transferee deserves should be determined by the date he would have transferred but for his employer's discrimination." Bing v. Roadway Express, Inc., 485 F.2d at 450. There is no way to arrive at such a date with exactitude, however, and some method for approximation is necessary.

In *Bing* we approved a "qualification date" formulation—the date a transferee had the experience necessary to qualify him

for a road driving job. 485 F.2d at 451.[29] The *Bing* test represents a compromise between the trial court's determination in that case that seniority rights should date from when the transferees applied to become road drivers, and the remedy requested by the Government as amicus, that transferees should carry over full company seniority. This Court felt, on the one hand, that the application-date formulation of the district court failed "to account for the realities of entrenched employment discrimination", 485 F.2d at 451; the company defendant's discriminatory practices discouraged city drivers from applying. On the other hand, the Government's theory of full seniority carryover would have given super-seniority to those transferees who were not qualified to be road drivers before they began working for the defendant. Until they were qualified, "discrimination could not have blocked their employment as road drivers". *Id.*

The *Bing* qualification-date formulation was rejected recently by a divided panel of the Sixth Circuit. In Thornton v. East Texas Motor Freight, 6 Cir. 1974, 497 F.2d 416, a case involving the same trucking company that is a defendant in the instant case, the Court affirmed the district court's grant of seniority carryover dating from six months after the transferee requested transfer or filed a charge with the EEOC. Although the Court distinguished *Bing* on the grounds that more charges were filed with the EEOC in *Thornton* (thus apparently showing that "silence and futility of protest" were less the norm), the

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[29] In this case the qualification date of a member of the plaintiff class of city drivers is the date when, in the employ of ETMF, the individual first accumulated three years combined road and city driving experience gained either with ETMF or with other organizations. If the individual already possessed such experience when hired by ETMF, of course, his qualification date will be the same as his company seniority date.

Similar to *Bing*, the straight qualification-date calculation must be modified to take account of that period from October 1969 to March 1971, during which ETMF did not hire any road drivers. The seniority of any member of the plaintiff class whose qualification date falls within the period when ETMF did no hiring must date from March 1970, when ETMF resumed hiring.

Court also criticized the *Bing* rationale: "The rationale in *Bing* was that silence might be caused by a belief in the futility of a transfer request. That may be true, but also it may be caused by no desire to transfer." 497 F.2d at 421. The Court also noted that "there is something to be said for rewarding those drivers who protest and help to bring rights to a group of employees who have been victims of discrimination". 497 F.2d 420.

We are unpersuaded by these considerations. First, we think that the best indication whether a person desired transfer to the road in the past is reflected in whether he desires transfer now, so long as we do not create special incentives or disincentives that skew the balance. The qualification-date test of *Bing*, by taking into account experience requirements on the one hand and the effects of entrenched discrimination on the other, is as neutral as any we can envision. Second, the concern showed by the *Thornton* majority for rewarding those who help to bring rights to a group of employees was adequately answered by Judge Phillips, dissenting in part: "Any such 'reward' should not be at the expense of the other victims of the discrimination. Title VII was enacted to protect *all* employees from unlawful discrimination. This is especially true where the discrimination intimidated the employees to such an extent that they felt it would be futile to request a transfer." 497 F.2d at 428. In short, we reaffirm the qualification-date formulation of Bing.[30]

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[30] The Circuit recently required that transferees in a trucking case similar to this one be permitted use of "full company seniority" in their new positions. Franks v. Bowman Transportation Co., 5 Cir. 1974, 495 F.2d 398, 416. The Court emphasized, however, a critical difference between that case and *Bing*: "In [*Bing*], Roadway had a flat requirement of one year's experience for road drivers, so that the qualification date was easily calculable. To allow the use company seniority before that date would have placed the discriminatee in a better position than he could have achieved without the discrimination. In this case, by contrast, Bowman had no rigid one-year experience requirement. It sometimes accepted OTR [over-the-road] trainees with little or no prior driving experience." *Id.* 495 F.2d at 417 n. 17. As in *Bing*, the qualification date in the instant case is easily calculable. The three-years experience requirement has been rigidly adhered to.

C. *Back Pay*

The district court should consider the question of back pay, with particular reference to the guidelines laid down in Pettway v. American Cast Iron Pipe Co., 494 F.2d at 251-263; Johnson v. Goodyear Tire & Rubber Co., 491 F.2d at 1375-1380; and Bing v. Roadway Express, Inc., 485 F.2d at 452-455. In these cases the criteria for the award of back pay, and the method of calculation, have been thoroughly analyzed. The most difficult question remaining before the district court will be the apportionment of the burden of paying any back pay awards among the three defendants. Consistent with the broad discretion awarded the district court on this question in Johnson v. Goodyear Tire & Rubber Co., 491 F.2d at 1382, we intimate no view to this question.

V

The Consent Decree

On June 29, 1972, the United States filed a "pattern and practice"[31] suit in the Northern District of Texas against ETMF, the Teamsters International, and the International Association of Machinists and Aerospace workers, challenging nationwide essentially the same practices at issue in the instant private class action. February 19, 1974, approximately one month before we heard oral argument in the case before us, the parties to the Government's suit entered into a consent decree. The decree covered:

> A. Such black or Spanish-surnamed city drivers, hostlers, checkers and garage employees who are domiciled at a terminal where road drivers are presently domiciled or where road drivers have been, since July 2, 1965, domiciled under either ETMF or a predecessor company.

[31] See 42 U.S.C. § 2000e-6.

> B. Such persons who are incumbent city employees employed at a non-road driving terminal who have, since July 2, 1965, indicated a desire to transfer to the road.[32]

In addition to setting some standards for hiring and establishing hiring ratios, the decree established "transfer procedures". City drivers were to be afforded 30 days "to indicate an interest in transferring to the road driver classification at the terminal in which he is employed (if that terminal has an over-the-road operation) or at a terminal within the job market, or to a terminal of his choice (if the terminal at which he is employed has no over-the-road operation) . . ." The issue of seniority rights was left for later resolution. The decree provided also that ETMF was to furnish a total of $175,000 as back pay compensation for members of the affected class nationwide. Persons accepting a portion of this settlement were to sign a release "stating that such designated portion is accepted in full and final settlement of all claims for monetary compensation, back pay or any other type of relief against ETMF or any predecessor corporation based upon any pending litigation or other alleged discriminatory actions because of race or national origin occurring prior to the date such release is signed".

[39, 40] A judgment by consent binds the parties and those in privity with them. Seaboard Air Line Railroad Co. v. George F. McCourt Trucking, Inc., 5 Cir. 1960, 277 F.2d 593. Members of the plaintiff class in the present action were neither parties to the Government's suit, nor do they have interests in privity with the Government. See Williamson v. Bethlehem Steel Corp., 2 Cir. 1972, 468 F.2d 1201, 1203, cert. denied, 411 U.S. 931, 93 S.Ct. 1893, 36 L.Ed. 390; *cf.* Trbovich v. United Mine Workers of America, 1972, 404 U.S. 528, 92 S.Ct. 630, 30 L.Ed.2d 686.

We hold, therefore, that the consent decree does not operate as collateral estoppel to prohibit any members of the plaintiff

[32] The decree also covered some named individuals.

class from participating in relief in this case See also IB J. Moore, Federal Practice ¶ 0.411[1] (2d ed. 1974). Those members of the plaintiff class who accept compensation under the consent decree and sign a release, of course, are bound by the terms of the release. But no other members of the plaintiff class lose any right to relief in the instant case.

We have chosen not to accord the consent decree any great weig[illegible] our outline of the relief to be awarded by the district court. First, the "affected class" awarded relief in the consent decree does not encompass an important segment of the plaintiffs' class here—black and Mexican-American city drivers at "non-road driving" terminals in the Texas-Southern Conference area who have not "indicated a desire to transfer to the road". The Government's remedy is thus based inplicitly on the theory, one we reject, that the acceptance by a black or Mexican-American of a job as a city driver at a city-only terminal, at a time when no road positions were open to him, signifies a lack of interest in a road driver position. Rather, we have taken cognizance of both the mobility of the modern work force and the reality of entrenched employment discrimination that makes a request to transfer a futile gesture. Second, private plaintiffs in class actions under Title VII and the United States in "pattern and practice" suits protect different interests: the Government protects general economic interests in addition to the rights of minorities; private plaintiffs represent only the interests of minority group members. United States v. Local No. 3, Operating Engineers, N.D.Calif.1972, 4 FEP Cases 1088, 1093. While the Government may be willing to compromise in order to gain prompt, and perhaps nationwide, relief, private plaintiffs, more concerned with full compensation for class members, may be willing to hold out for full restitution. Finally, we cannot ignore the possibility that, if we permit negotiated settlements by the Government to control the relief accorded in pending private actions against the same plaintiffs, private actions will be significantly discouraged. Such a result would have a deleterious

effect on enforcement of Title VII and would not, in our opinion, be consistent with the intent of Congress.

We are not unmindful of the argument that by going beyond the relief awarded by the consent decree we may discourage defendants in "pattern and practice" suits from entering into settlements with the United States when a Title VII private class action is proceeding simultaneously against the same defendant. The court in *Local No. 3, Operating Engineers* expressed a similar concern: "If the United States cannot offer a final settlement in cases where a pattern and practice suit is proceeding simultaneously with a class action, then the Government's bargaining power will be severely reduced". 4 FEP Cases at 1093. Our worries are eased, however, as were those of the court in *Local No. 3, Operating Engineers*, by the Government's support of the broad class relief outlined in the opinion. As amicus curiae in this case, the EEOC has filed a post-argument brief arguing that "those who elect not to take under the consent decree, as well as those who are not covered by the decree, should have an opportunity to pursue vindication of their rights through this private litigation".[33]

The case is reversed and remanded for proceedings consistent with this opinion.

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[33] Supplemental Brief for the United States Equal Employment Opportunity Commission as Amicus Curiae 4.

APPENDIX C

In the District Court of the United States for the
Western District of Texas
San Antonio Division

Ernest Herrera, et al.

v.

Yellow Freight System, Inc., et al.

Civil Action No.
SA-71-CA-296

Findings of Fact and Conclusions of Law

On the 22nd day of January, 1973, came on to be heard the above entitled and numbered cause for trial on the merits, and both parties appeared in person and by their Attorneys of Record and announced ready for trial, whereupon the Court proceeded to hear the evidence from the witnesses and oral arguments of counsel and at the conclusion of the trial and after consideration of all the pleadings, the evidence adduced by both parties, the arguments of counsel and applicable law, the Court hereby makes its Findings of Fact and Conclusions of Law.

Findings of Fact

1. This Court has jurisdiction of this action by virtue of Title 42, U.S.C., Section 2000e-5(f) and Title 28, U.S.C., Section 1343 (4) providing a cause of action under Title 42, U.S.C., Section 1981.

2. The plaintiffs are employees of the defendant truck line and members of the defendant Union and its affiliates (Local 657 of the Southern Conference of Teamsters and the International Conference of Teamsters). Plaintiffs are all Mexican-American

residents of the United States and residents of San Antonio, Bexar County, Texas. The defendant truck line is a corporation doing business in the State of Texas and the City of San Antonio and operates and maintains a local city-wide freight terminal and a city-wide trucking service in San Antonio, Bexar County, Texas and is an employer within the meaning of Title 42, U.S.C., Section 2000e-(b). The defendant Union and its affiliates are the representatives and bargaining agents of the plaintiff employees on an international, regional and local basis.

3. All plaintiffs were hired by the defendant truck line as regular city pick-up and delivery drivers on the dates set out herein and have remained in that capacity to the present time.

Ernest Herrera—July, 1965

Mario Melchor—October, 1964

Trine Uribe—October, 1964

4. It is stipulated that none of the plaintiff employees were discriminated against as to their original employment.

5. The defendant truck line does not have any road drivers domiciled in San Antonio, Bexar County, Texas and the San Antonio terminal is operated solely as a local, city-wide pick-up and delivery service.

6. On April 1, 1970 the defendant truck line and the defendant Union entered into the National Master Freight Agreement and Southern Conference Area Local Freight Forwarding Pick-up and Delivery Supplemental Agreement (hereinafter referred to as "Union Contract") which expires June 30, 1973 and the terms and conditions of which are fully known and understood by the plaintiff employees. The plaintiff employees have ratified this contract and prior similar contracts since the time of their employment.

7. The provisions of the Union Contract providing for job transfer from a city driver to a road driver and vice versa, including the provision for separate seniority lists for city and line drivers, apply to all job applicants and employees regardless of race or qualifications.

8. The defendant truck line's policy and regulations regarding job transfers are generally:

(a) The applicant must relinquish his current position;

(b) The applicant must make written application for a new position at terminal location where the job is sought;

(c) The applicant must be willing to relocate at the new terminal location;

(d) For a road driver job, applicants must pass certain standardized Department of Transportation tests and company tests (driving and physical); and

(e) The applicants must have certain road driving experience.

These regulations are not unreasonable and apply to all job applicants and employees regardless of race or qualifications. The fact that each terminal is autonomous as concerns the employment of drivers is proper and in accordance with accepted business practices.

9. The plaintiff employees testified that they were unwilling or at least ambivalent to comply with the job transfer requirements even when confronted with a hypothetical opportunity to make the job change under the existing regulations "tomorrow" assuming a position was available. Thus, plaintiffs' objections are not grounded on lack of job availability, but rather on the stringency of the regulations.

10. None of the plaintiffs have ever made written application for a position as road driver. Plaintiff Uribe's application

is not considered to be in full compliance with regulations and company policy in applying for this position.

11. The defendant truck line employs a majority of Mexican-Americans and Negroes in all phases of its San Antonio Terminal operation and there has been no showing of discrimination as regards the hiring practices of that office.

12. The plaintiff employees have never filed a discrimination grievance charging a violation under Article 38 of the Union Contract, but originally filed a Complaint with the Equal Employment Opportunity Commission.

13. The plaintiff employees have never availed themselves of participating in the contract amendment negotiation meetings at the local Union level in an effort to change the job transfer requirements.

14. The plaintiff employees have not been discriminated against by their Union as the Union is comprised of a majority of Mexican-Americans and Negroes and every member is free to participate in the contract negotiating process and to vote on every issue or contract presented to the membership.

15. When the plaintiff employees inquired from various supervisory personnel at the San Antonio Terminal as to the method of securing a road driving position, they were not discouraged nor misled, but rather the requirements were explained (i.e. they would have to make application at the road driving terminal location, etc.) and the plaintiffs chose not to make application. The failure of the plaintiff employee to secure a road driving position was due to a lack of diligence on their part, an unwillingness to give up their city driving seniority, and an inability to meet the job qualifications rather than actual racial discrimination by either the defendant truck line or the defendant Union.

16. None of the plaintiff employees could satisfy all of the qualifications for a road driver position according to the company manual due to age or weight or driving record. The qualifications apply universally to all job applicants and employees and are not in any manner racially discriminatory.

17. Both the defendant truck line and the Union defendants are bound by the contracts in that neither can unilaterally change the contract provisions by allowing a merger of seniority lists, a transfer of seniority or in any other manner attempting to alter, combine or discard the provisions of the separate contracts for city and road drivers without subjecting themselves to economic or other negative sanctions by the non-offending party.

18. Refusal by the defendant truck line to permit job transfers without loss of terminal seniority or to maintain separate seniority lists is a reasonable and proper business practice and in accordance with the Union Contract and in no manner causes, perpetuates or results in discriminatory practices by any of the defendants.

19. The fact that there are separate Union Contracts and job qualifications for city and road drivers is reasonable both as an accepted business practice and by the fact that the National Labor Relations Board recognizes the two job groups as separate bargaining units.

20. The defendant truck line did not prevent or discourage the plaintiff employees from seeking or securing a road job transfer nor from making written application for said position because of their race or because they filed a Complaint with the Equal Employment Opportunity Commission, or for any other reason.

21. The defendant truck line and Union did not discriminate against the plaintiff employees because they made a charge or indicated they would make a charge against the defendants to the Equal Employment Opportunity Commission.

22. The defendants did not discriminate against the plaintiffs or any other employee or Union member on the basis of race or otherwise.

23. While not compelling, further evidencé of the continuing desire of the vast majority of the local Union membership is contained in the Affidavit of R. C. Shafer, President and Business Manager of the local Union, and George Hardeman, Jr., Recording Secretary of the local Union, filed February 23, 1973 and stipulated to by the parties to this suit by Stipulation filed March 6, 1973. The Affidavits show that at the Union Membership meeting on February 11, 1973, after the trial of this case was completed, the employees of the defendant truck line, and others, rejected proposals that the next City and road driver contracts be merged and that both job classifications be permitted to transfer to the other with company seniority for all purposes. A further proposal to the effect that the seniority of the employees working for the freight lines remain as it is in the current contracts was approved by a vote in excess of two to one.

Conclusions of Law

1. I conclude as a matter of law that none of the defendants violated Title 42, United States Code, Section 2000e-5 or any section of Title 42 relating to race discrimination.

2. I further conclude as a matter of law that the plaintiffs, and each of them, take nothing by reason of their suit and that the defendants and each of them are entitled to judgment.

3. I further conclude that the defendants, and each of them, recover their court costs incurred herein against the plaintiffs.

Entered this 22nd day of March, 1973, at San Antonio, Texas.

/s/ JOHN H. WOOD, JR.
United States District Judge

APPENDIX D

Ernest Herrera, et al.,
Plaintiffs-Appellants,

v.

Yellow Freight System, Inc., et al.,
Defendants-Appellees.

No. 73-2254.

United States Court of Appeals,
Fifth Circuit.

Nov. 25, 1974.

Mexican-American city truck drivers brought employment discrimination action challenging motor carrier's "no-transfer" policy and maintenance of separate seniority rosters for city and road drivers, which conduct allegedly resulted in plaintiffs being discriminatorily "locked-in" to their city driver jobs without realistic opportunity for transfer to higher paying road job positions. The United States District Court for the Western District of Texas, John H. Wood, Jr., J., found no discrimination and plaintiffs appealed. The Court of Appeals, Wisdom, Circuit Judge, held that plaintiffs established prima facie case of hiring discrimination perpetuated by racially neutral "no-transfer" and "no-seniority-carryover" policies of carrier and union organizations, and that discriminatory effects of policies was not justified on ground of business necessity.

Reversed and remanded.

1. Civil Rights Key 44(1, 4)

Mexican-American city truck drivers established prima facie case of hiring discrimination with respect to more lucrative road driver positions and of perpetuation of such discrimination by racially neutral "no-transfer" and "no-seniority-carryover" policies of motor carrier and union organizations. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

2. Civil Rights Key 9.10

Discriminatory effect of racially neutral "no-transfer" and "no-seniority-carryover" policies which precluded city truck drivers from transferring to more lucrative road-driving positions from which minorities had previously been excluded was not justified on ground of business necessity. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

3. Civil Rights Key 43

Mexican-American city drivers, who instituted employment discrimination action challenging policies which precluded transfer by city drivers to more lucrative road-driving positions and maintenance of separate seniority rosters for road and city drivers without provision for seniority carryover, did not have burden of showing that they had applied for road driving positions and that they were qualified for such positions where there was past history of discrimination, application would have been futile exercise and they had no opportunity to prove their qualifications. Civil Rights Act of 1964, § 701 et seq.; 42 U.S.C.A. § 2000e et seq.

Appeal from the United States District Court for the Western District of Texas.

Before Wisdom, Ainsworth and Godbold, Circuit Judges.

Wisdom, Circuit Judge:

This is an action brought under Title VII of the Civil Rights Act of 1964 by three Mexican-American city drivers employed by the defendant Yellow Freight System, Inc. The plaintiffs contend that the company defendant's past discrimination in the hiring of road drivers has been perpetuated by the company's no-transfer policy and by the maintenance of separate seniority rosters for road and city drivers without provision for seniority carryover by the defendant unions. As a result of these policies, the plaintiffs argue, they have been discriminatorily "locked in" their city driver jobs without any realistic opportunity to transfer to a higher paying road job position. The district court found no discrimination. On the authority of Rodriguez v. East Texas Motor Freight, 5 Cir. 1974,—F.2d—, decided today, we reverse.

In almost every respect this suit is a carbon copy of *Rodriguez*, except that *Rodriguez* was a class action while this is brought only on behalf of the individual plaintiffs. The plaintiffs here work as city drivers in Yellow Freight's San Antonio terminal. Like East Texas Motor Freight, Yellow Freight domiciles no road drivers in San Antonio. Like East Texas Motor Freight, Yellow Freight's history of road-driver hiring is heavily tainted by discriminatory exclusion of minority drivers.[1] And like East Texas Motor Freight, Yellow Freight, and the unions, have hindered the transfer of city drivers to road driver jobs by a no-transfer policy and the maintenance of separate seniority

[1] Yellow Freight responded to the plaintiffs' interrogatories by stating that it employed 50 line drivers at Dallas and 46 line drivers at Amarillo. Yellow Freight employed no Mexican-American line drivers at either terminal until after the complaint was filed in this suit.

rosters. This case was brought before the same district judge that heard *Rodriguez* a few days later. Similar to its finding in *Rodriguez*, the court found that none of the plaintiffs "could satisfy all the qualifications for a road driver position according to the company manual due to age or weight or driving record". The court concluded that "[t]he defendants did not discriminate against the plaintiffs or any other employee or Union member on the basis of race or otherwise".

[1, 2] The defendants here advance many of the same arguments in support of the district court's conclusion that the defendants advanced in *Rodriguez*, and again we reject them. It is our considered view that the plaintiffs established a prima facie case of hiring discrimination perpetuated by the racially neutral no-transfer and no-seniority-carryover policies of Yellow Freight, Local 657, and the Southern Conference.[2] The discriminatory effect of these policies was not justified by a showing of business necessity. The district court's finding of no discrimination, therefore, is erroneous.

[3] Because this is not a class action, we pause to amplify our discussion in *Rodriguez* of McDonnell Douglas Corp. v. Green, 1973, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668. In *McDonnell Douglas* the Court outlined the following test for a complainant in a Title VII action:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position re-

[2] Because the separate seniority lists originate at the Southern Conference level, we find no violation of Title VII by the defendant Teamsters International.

mained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. at 802, 93 S.Ct. at 1824. The defendants argue here that *McDonnell Douglas* must control. In *Rodriguez* we distinguished *McDonnell Douglas* on three grounds. Rodriguez was a class action; there was a history of hiring discrimination sufficient to make application for a road driving job a futile exercise; and the plaintiffs had been denied the opportunity to show that they were qualified to become road drivers, because they had not been given a road test. Although the instant case is not a class action, we are of the view that McDonnell Douglas is distinguishable on the other two grounds. Here there is a history of past hiring discrimination, and, as in *Rodriguez*, the plaintiffs had no opportunity to take a road test and thus to prove their qualifications.[3]

We reverse and remand to the district court for consideration of the remedy question in light of *Rodriguez*.

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[3] Jim Norman, road operations manager for Yellow Freight at its Baxter Springs, Kansas, terminal, testified that he would consider a line driver qualified only after personally testing the driver in the equipment and checking his knowledge of safety requirements.

APPENDIX E

In the District Court of the United States
For the Western District of Texas
San Antonio Division

Patrick Resendis, et al.,

v.

Lee Way Motor Freight, Inc., et al.

Civil Action.
No. SA-71-CA-282.

Findings of Fact and Conclusions of Law

On the 24th day of January, 1973, came on to be heard the above entitled and numbered cause for trial on the merits, and both parties appeared in person and by their Attorneys of Record and announced ready for trial, whereupon the Court proceeded to hear the evidence from the witnesses and oral arguments of counsel and at the conclusion of the trial and after consideration of all the pleadings, the evidence adduced by both parties, the arguments of counsel and applicable law, the Court hereby makes its Findings of Fact and Conclusions of Law.

Findings of Fact

1. This Court has jurisdiction of this action by virtue of Title 42, U.S.C., Section 2000 e-5(f) and Title 28, U.S.C., Section 1343 (4) providing a cause of action under Title 42, U.S.C., Section 1981.

2. The plaintiffs are employees of the defendant truck line and members of the defendant Union and its affiliates (Local 657 of the Southern Conference of Teamsters and the International Conference of Teamsters), with the exception of Ar-

turo Rodriguez who is no longer an employee of the defendant truck line. Plaintiffs are all Mexican-American residents of the United States and residents of San Antonio, Bexar County, Texas, with the exception of Wilburn White who is a Black-American. The defendant truck line is a corporation doing business in the State of Texas and the City of San Antonio and operates and maintains a local city-wide freight terminal and a city-wide trucking service in San Antonio, Bexar County, Texas and is an employer within the meaning of Title 42, U.S.C., Section 2000 e-(b). The defendant Union and its affiliates are the representatives and bargaining agents of the plaintiff employees on an international, regional and local basis.

3. The plaintiffs were hired by the defendant truck line as follows:

Tony Escobedo became a regular city driver through the acquisition in 1966 of Texas-Arizona Motor Lines and has continued in that position to this date;

Patrick Resendis became a regular city driver in May, 1963, and has continued in that position to this date;

Arturo Rodriguez became a regular city driver in October, 1962, and transferred to an over-the-road driver job in May, 1967; in October, 1971 he was dismissed due to excessive accidents and is no longer an employee of the defendant truck line;

Wilburn White has been employed on a casual basis (i.e., whenever he was needed) as a city driver or dock worker since 1967 and continues in that status at this date; and Elias Gonzales began work as a city driver in 1950 and continues as such to this date.

4. It is stipulated that none of the plaintiff employees were discriminated against as to their original employment.

5. The defendant truck line had no road drivers domiciled in San Antonio, Bexar County, Texas prior to its acquisition of Texas-Arizona Motor Lines in 1966 and was operated solely as a local, city-wide pick-up and delivery service. Subsequent to the acquisition of Texas-Arizona Motor Lines, which had road drivers domiciled at San Antonio, the Company has operated a domicile for road drivers at San Antonio, Texas.

6. Of the twenty-six (26) road drivers currently listed for the San Antonio terminal, the Company has hired five, one of whom, the plaintiff Rodriguez, has been dismissed. Of the remaining twenty-two (22), all were employed by the acquired Texas-Arizona Motor Lines; the defendant Company had no part in the hiring of these employees.

7. Of the five road drivers referred to above, which the Company has hired, the plaintiff Rodriguez was among the first so hired.

8. On April 1, 1970 the defendant truck line and the defendant Union entered into the National Master Freight Agreement and Southern Conference Area Local Freight Forwarding Pick-up and Delivery Supplemental Agreement (hereinafter referred to as "Union Contract") which expires June 30, 1973 and the terms and conditions of which are fully known and understood by the plaintiff employees. The plaintiff employees have ratified this contract and prior similar contracts since the time of their employment, with the exception of Arturo Rodriguez who voted against ratification of the current contract solely because of the strike and lock-out by the Chicago bargaining unit in the Spring of 1970 and not due to any contract clause made the subject of this suit.

9. The provisions of the Union Contract providing for job transfer from a city driver to a road driver and vice versa, including the provision for separate seniority lists for city and

line drivers, apply to all job applicants and employees regardless of race or qualifications, and are not in any way discriminatory.

10. The defendant truck line's policy and regulations regarding job transfers are generally:

(a) The applicant must make written application for a new position at terminal location where the job is sought;

(b) The applicant must be willing to re-locate at the new terminal location;

(c) For a road driver job, applicants must pass certain standardized Department of Transportation tests and company tests (driving and physical); and

(d) The applicants must have certain road driving experience.

These regulations are not unreasonable and apply to all job applicants and employees regardless of race or qualifications. The fact that each terminal is autonomous as concerns the employment of drivers is proper and in accordance with accepted business practices.

11. The defendant truck line began posting bulletins as to the availability of jobs at other terminals, including road driver jobs, in 1971. The defendant truck line has attempted to recruit minority employees through local job fair programs and newspaper advertisements, including advertisements placed in minority publications, and at present has a policy requiring that before hiring a non-minority employee to fill an opening, the terminal manager must first contact the Company's personnel office and explain satisfactorily why he is not hiring a minority employee for the job.

12. The plaintiff, Patrick Resendis, has not signed up under any of the job opportunity bulletins relating to road driver job openings at other terminals. Neither has the plaintiff, Tony Escobedo, or the plaintiff, Elias Gonzales.

13. The plaintiff, Elias Gonzales, has never asked for a road driver job and states that he would not move from the San Antonio area to take one and refuses to give up any of his city driver seniority to take one.

14. The plaintiff, Arturo Rodriguez, was dismissed by the defendant truck line because of a poor driving record involving at least two accidents within the one year period immediately preceding his dismissal. Police accident reports indicated that he could have avoided at least one of the accidents. The defendant truck line's dismissal of the plaintiff, Arturo Rodriguez, was upheld through the Union grievance procedure and did not result from any discrimination against this plaintiff because of his race or national origin. The dismissal was for valid and proper business reasons.

15. The plaintiff, Tony Escobedo, is 5'9" tall and weighs almost 300 lbs. He has a very bad left leg, having been shot three times. The bad leg and his overweight condition are of continuing medical concern and cause plaintiff to be unusually slow in the performance of his current duties and prevent his physical qualification for the job of road driver. Any denial by the defendant truck line of a road driver job under these facts is for valid and proper business reasons and not in any way the result of discrimination against the plaintiff, Escobedo, because of his race or national origin.

16. The plaintiff, Wilburn White, has never made application for a road driver job. During the period that the plaintiff, White, worked as a casual employee for the defendant truck line, two other Black-Americans were also employed as casual employees. Two other Black-Americans were hired as regular city drivers in August and September of 1972. The defendant truck line has employed other Black-Americans as regular city drivers in the past. The failure to hire the plaintiff, White, has not been the result of any racial discrimination on the part of the de-

fendant truck line, and was so admitted during the plaintiff White's testimony in Open Court. The plaintiff, White, stated that discrimination, if any, against him was personally rather than racially oriented. The Court finds that there has been no unlawful discrimination against this plaintiff whatsoever.

17. The defendant truck line employs a substantial number of Mexican-American and Negroes in its San Antonio Terminal operations (both city and road) and there has been no showing of discrimination as regards the hiring practices of that office.

18. The plaintiff employees have never filed a discrimination grievance charging a violation under Article 38 of the Union Contract.

19. The plaintiff employees have never availed themselves of participating in the contract amendment negotiation meetings at the local Union level in an effort to change the job transfer requirements.

20. The plaintiff employees have not been discriminated against by their Union as the Union is comprised of a majority of Mexican-Americans and Negroes and every member is free to participate in the contract negotiating process and to vote on every issue or contract presented to the membership.

21. When the plaintiff employees inquired from various supervisory personel at the San Antonio Terminal as to the method of securing a road driving position, they were not discouraged nor mislead, but rather the requirements were explained (i.e. they would have to make application at the road driving terminal location, etc.) and the plaintiffs chose not to make application. The failure of the plaintiff employees to secure a road driving position was due to a lack of diligence on their part, an unwillingness to give up their city driving seniority, and an inability to meet the job qualifications rather than actual racial discrimination by either the defendant truck line or the defendant Union.

22. Both the defendant truck line and the Union defendants are bound by the contracts in that neither can unilaterally change the contract provisions by allowing a merger of seniority lists, a transfer of seniority or in any other manner attempting to alter, combine or discard the provisions of the separate contracts for city and road drivers without subjecting themselves to economic or other negative sanctions by the non-offending party.

23. Refusal by the defendant truck line to permit job transfers without loss of terminal seniority or to maintain separate seniority lists is a reasonable and proper business practice and in accordance with the Union Contract and in no manner causes, perpetuates or results in discriminatory practices by any of the defendants.

24. The fact that there are separate Union Contracts and job qualifications for city and road drivers is reasonable both as an accepted business practice and by the fact that the National Labor Relations Board recognizes the two job groups as separate bargaining units.

25. The defendant truck line did not prevent or discourage the plaintiff employees from seeking or securing a road job transfer nor from making written application for said position because of their race or because they filed a Complaint with the Equal Employment Opportunity Commission, or for any other reason.

26. The defendant truck line and Union did not discriminate against the plaintiff employees because they made a charge or indicated they would make a charge against the defendants to the Equal Employment Opportunity Commission.

27. The defendants did not discriminate against the plaintiffs or any other employee or Union member on the basis of race or otherwise.

28. While not compelling, further evidence of the continuing desire of the vast majority of the local Union membership is contained in the Affidavit of R. C. Shafer, President and Business Manager of the local Union, and George Hardeman, Jr., Recording Secretary of the local Union, filed February 23, 1973, and stipulated to by the parties to this suit by Stipulation filed March 6, 1973. The Affidavits show that at the Union Membership meeting on February 11, 1973, after the trial of this case was completed, the employees of the defendant truck line, and others, rejected proposals that the next City and road driver contracts be merged and that both job classifications be permitted to transfer to the other with company seniority for all purposes. A further proposal to the effect that the seniority of the employees working for the freight lines remain as it is in the current contracts was approved by a vote in excess of two to one.

Conclusions of Law

1. I conclude as a matter of law that none of the defendants violated Title 42, United States Code, Section 2000e-5 or any section of Title 42 relating to race discrimination.

2. I further conclude as a matter of law that the plaintiffs, and each of them, take nothing by reason of their suit and that the defendants and each of them are entitled to judgment.

3. I further conclude that the defendants, and each of them, recover their court costs incurred herein against the plaintiffs.

Entered this 22nd day of March, 1973, at San Antonio, Texas.

/s/ JOHN H. WOOD, JR.
United States District Judge

APPENDIX F

Patrick Resendis, Tony Escobedo, Wilburn White, Arturo Rodriguez and Elias Gonzales, Plaintiffs-Appellants,

v.

Lee Way Motor Freight, Inc., et al., Defendants-Appellees.

No. 73-2322.

United States Court of Appeals, Fifth Circuit.

Nov. 25, 1974.

Mexican-American city truck drivers, former Mexican-American regular road driver and Negro casual city driver instituted employment discrimination action against motor carrier and union organizations. The United States District Court for the Western District of Texas, John H. Wood, Jr., J., rendered judgment in favor of the defendants and the plaintiffs appealed. The Court of Appeals, Wisdom, Circuit Judge, held that statistics established prima facie case of past discrimination in the hiring of road drivers; that discrimination had been continued by motor carrier's "no-tranfer" policy restricting transfers between city driver jobs and more lucrative road driver jobs and by maintenance of separate seniority rosters; that past hiring discrimination was perpetuated following abandonment of the "no-transfer" policy; that defendants failed to effectively answer prima facie case of employment discrimination against Mexican-American city drivers; that discharge of Mexican-American over the road driver was not result of discrimination; and that Negro casual city driver failed to prove that refusal to accord him regular status was result of racial discrimination.

Affirmed in part; reversed in part and remanded.

1. Civil Rights Key 44(1)

Statistics showing that, following motor carrier's acquisition of assets of another carrier which had an over-the-road terminal in city and which employed twenty-five or thirty white/Anglo road drivers, motor carrier hired approximately six white/Anglo road drivers and one Mexican-American road driver at the terminal and that carrier had never employed a Negro road driver in the city and disparity in percentage of minority employees between carrier's city and road driving forces established prima facie case of discrimination in past hiring of road drivers. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

2. Civil Rights Key 9.10

Motor carrier's past discrimination in the hiring of road drivers was continued by carrier's "no-transfer" policy restricting transfer of city drivers to more lucrative road driver jobs and by maintenance by carrier and union organizations of separate seniority rosters. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

3. Civil Rights Key 9.10

Motor carrier's perpetuation of past hiring discrimination with respect to road drivers was continued following abandonment of its policy restricting transfer of city drivers to more lucrative road driver jobs by refusal of carrier and union organizations to permit minority city drivers to carry over their competitive status seniority to road driver jobs. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

4. Civil Rights Key 44(1)

Motor carrier and union organizations failed to effectively answer prima facie case of employment discrimination in hiring for road driver jobs. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

5. Civil Rights Key 46

Motor carrier would be required to consider Mexican-American city drivers who had previously been discriminatorily excluded from more lucrative road driving positions for such positions as vacancies occurred and, if they should qualify for road driver positions, they should be awarded seniority carryover based on a "qualification-date" formula. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

6. Civil Rights Key 9.12

Fact that motor carrier which had discriminatorily excluded minority persons from road driver positions did not acquire road terminal in city where Mexican-American city drivers who instituted employment discrimination action worked until 1966 was irrelevant to computation of seniority which those drivers would be entitled to carry over from their city driver positions to road driver jobs should they be found qualified for road driver positions. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

7. Civil Rights Key 46

If Mexican-American city truck drivers who had been discriminatorily excluded from more lucrative road driving positions should prove qualified to transfer to the road driver positions, they would be entitled to back pay. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

8. Civil Rights Key 44(1)

Evidence that Mexican-American who had been discharged from his position as a road driver for motor carrier had been discharged because of poor driving record involving at least two accidents within one-year period immediately preceding his dismissal and that dismissal had been upheld through union grievance procedures sustained determination that dismissal was not result of discrimination. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

9. Civil Rights Key 44(1)

Evidence that, at time Negro first began driving for motor carrier as a casual city driver, there were four Negro city drivers on regular status, that, since that time, motor carrier had hired four Mexican-American, one Anglo and two Negro regular city drivers and that Negro casual driver had suffered in the past from an "attitude problem" failed to prove that refusal to accord Negro casual driver regular status was result of discrimination. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

Appeal from the United States District Court for the Western District of Texas.

Before WISDOM, AINSWORTH and GODBOLD, Circuit Judges.

WISDOM, Circuit Judge:

Like its companies Title VII cases, Rodriguez v. East Texas Motor Freight, 5 Cir. 1974, — F.2d —, and Herrera v. Yellow Freight System, Inc., 5 Cir. 1974, — F.2d —, this appeal in-

volves claims of discrimination in the exclusion of minority persons from the sought-after road driving jobs in the trucking industry. Plaintiffs Resendis, Escobedo, and Gonzales are Mexican-American city drivers for Lee Way Motor Freight, Inc. in San Antonio, Texas. Plaintiff Rodriguez was formerly a regular over-the-road driver in San Antonio for Lee Way, but was discharged after four and one-half years as a line driver. Plaintiff White is a Negro "casual" city driver for Lee Way in San Antonio.[1] The same district judge who decided *Rodriguez* and *Herrera* found that the plaintiffs had failed to prove a case of discrimination against any of the defendants under Title VII. We affirm in part and reverse in part and remand.

[1] Prior to January 1, 1966, Lee Way domiciled only city drivers in San Antonio. At that time, Lee Way acquired three-fourths of the assets of Texas-Arizona Motor Freight, Inc., which included an over-the-road terminal in San Antonio. Upon the acquisition, the 25 or 30 white/anglo road drivers domiciled there became the employees of Lee Way. Since then, Lee Way has hired approximately six white/anglo line drivers, and one Mexican-American line driver at the San Antonio terminal. The sole Mexican-American road driver is the plaintiff-appellant Antonio Rodriguez, who was discharged in 1972. Lee Way has never employed a Negro line driver in San Antonio. Of 44 city drivers for Lee Way in San Antonio, 26 or 28 are Mexican-American, four are black, and the remainder are white/anglo. Especially in light of the contrast in the percentage of minority employees between Lee Way's city and road driving fleets, we hold that these statistics establish a prima facie case of discrimination in the past hiring of road drivers.

[2, 3] This discrimination has been continued by Lee Way's no-transfer policy, and by the maintenance of separate senior-

---

[1] "Casual" drivers have no seniority. They are not required to work only for one company, but may take jobs as casuals with a number of trading companies in the area.

ity rosters through the action of Lee Way, Local 657, and the Southern Conference.[2] Lee Way abandoned its no-transfer policy in 1971, but the perpetuation of past hiring discrimination was continued through the refusal of the defendants to permit minority city drivers to carry over their competitive status seniority to road driver jobs.[3]

[4-7] The prima facie case of employment discrimination by Lee Way, the Southern Conference, and Local 657 against Resendis, Escobedo, and Gonzales has not been effectively answered.[4] We reverse the lower court's judgment with regard to these plaintiffs, and remand for consideration of the appropriate remedy in accordance with our opinion in *Rodriguez*. The district court should require that Lee Way consider these plaintiffs for road driver positions as vacancies occur, and the court should supervise closely the standards used by Lee Way in determining whether the drivers qualify for transfer. If any of the plaintiffs qualifies for a road driver position,[5] he should be awarded seniority carryover based on a "qualification-date" formula. See Bing v. Roadway Express, Inc., 5 Cir. 1973, 485 F.2d 441, 451. That Lee Way did not acquire a road driver

---

[2] We find no violation of Title VII by the defendant Teamsters International. See Herrera v. Yellow Freight System, Inc., 5 Cir. 1974, — F.2d —, n. 2.

[3] The operation of no-transfer policies and separate seniority rosters is fully described in Rodriguez v. East Texas Motor Freight, 5 Cir. 1974, — F.2d —.

[4] William Blood, Director of Personnel for Lee Way testified that the company has undertaken recently an affirmative action program to increase its hiring of minority road drivers. While we find this program commendable, it does not excuse either Lee Way's past record or its present practices with regard to minority city drivers locked into their jobs by their inability to transfer seniority. See Rowe v. General Motors Corp., 5 Cir. 1972, 457 F.2d 348, 356.

[5] We note that John Reaves, terminal manager for Lee Way in San Antonio, testified that in his opinion Resendis is qualified as a road driver and that Gonzales "could probably qualify" as a road driver.

terminal in San Antonio until 1966 is irrelevant to the proper computation of seniority. No hardship will be inflicted upon Lee Way or the union defendants by adjusting the plaintiffs' seniority to dates prior to the time Lee Way domiciled road drivers in San Antonio. To the extent that returning these drivers to their "rightful place" works a hardship at all, it will work it on those white drivers for Lee Way who will find their seniority expectations altered. But, as the Court said in United States v. Bethlehem Steel Corp., 2 Cir. 1971, 446 F.2d 652, 663: "Assuming *arguendo* that the expectations of some employees will not be met, their hopes arise from an illegal system. Moreover, their seniority advantages are not indefeasibly vested rights but mere expectations derived from a bargaining agreement subject to modification." See also Vogler v. McCarthy, Inc., 5 Cir. 1971, 451 F.2d 1236, 1238-1239. If Resendis, Escobedo, or Gonzales proves qualified to transfer to the road, he should be awarded back pay. See Pettway v. American Cast Iron Pipe Co., 5 Cir. 1974, 494 F.2d 211, 251-263; Johnson v. Goodyear Tire & Rubber Co., 5 Cir. 1974, 491 F.2d 1364, 1376-1380; Bing v. Roadway Express, Inc., 485 F.2d at 452-455.

[8] Arturo Rodriguez served as a line driver for Lee Way in San Antonio until he was fired on October 29, 1972. The district court found that Lee Way discharged Rodriguez "because of a poor driving record involving at least two accidents within the one year period immediately preceding his dismissal." Rodriguez's dismissal was upheld through union grievance procedures. He introduced no convincing evidence at trial that his dismissal was in any way improper. We conclude that the district court's finding of no discrimination in Rodriguez's dismissal is supported in the record.

[9] Nor can we disagree with the district court's finding that Wilburn White failed to prove a case of discrimination against him by any of the defendants. White began working as a city driver in a "casual" status in 1967. He complains that Lee Way

has refused to accord him "regular" status because he is a Negro. But in 1967, when White first began driving for Lee Way, there were four Negro city drivers on "regular" status. Since 1967 Lee Way has hired seven regular city drivers—four Mexican-American, one anglo, and two Negro. These statistics establish no prima facie case of discrimination against blacks by Lee Way in its hiring of city drivers in San Antonio.[6] Moreover, there was testimony at trial that White had suffered in the past from an "attitude problem." Although there was also testimony that White's attitude had improved, this factor alone provides an insufficient basis to doubt the correctness of the district court's finding that none of the defendants discriminated against White.[7]

Affirmed in part; reversed in part, and remanded.

---

[6] Compare Rodriguez v. East Texas Motor Freight, 5 Cir. 1974, — F.2d — and the cases cited there, — F.2d at — and n. 17.

[7] Even White himself seems unsure that his inability to obtain a regular city driving job is the result of racial rather than personal, animus. The following colloquy took place at trial during White's cross-examination:

> Q. Now, have you ever told Mr. Shafer down at the Union that Lee Way has been discriminating against you personally?
>
> A. Yes, sir.
>
> Q. And did you tell him that the way you felt they were discriminating against and was because they weren't giving you as an individual a job?
>
> A. As an individual?
>
> Q. Yes, sir, give you, Wilburn White, a job.
>
> A. Yes, I told him that they could have given me more work. They could give me more work but they wasn't doing it.
>
> Q. You have never complained to Mr. Shafer of the Union about Lee Way discriminating against Negroes as a race, have you?
>
> A. No, sir.
>
> Q. Just against you personally?
>
> A. Yes, but I am a Negro.

APPENDIX G

United States Court of Appeals
For the Fifth Circuit

October Term, 1973

No. 73-2801

D. C. Docket No. CA-SA-71-CA-302

Jesse Rodriguez, Sadrach G. Perez and Modesto Herrera, on their own behalf and on behalf of those similarly situated,

Plaintiffs-Appellants,

versus

East Texas Motor Freight, Southern Conference of Teamsters and Teamsters Local 657,

Defendants-Appellees.

Appeal From the United States District Court for the Western District of Texas

Before WISDOM, AINSWORTH and GODBOLD, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court for proceedings consistent with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiffs-appellants, the cost on appeal to be taxed by the Clerk of this Court.

November 25, 1974

Issued as Mandate:

APPENDIX H

United States Court of Appeals
For the Fifth Circuit

October Term, 1973

No. 73-2254

D. C. Docket No. CA SA-71-CA-296

Ernest Herrera, et al.,

Plaintiffs-Appellants,

versus

Yellow Freight System, Inc., et al.,

Defendants-Appellees.

Appeal From the United States District Court for the
Western District of Texas

Before WISDOM, AINSWORTH and GODBOLD, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

November 25, 1974

Issued as Mandate:

APPENDIX I

United States Court of Appeals
For the Fifth Circuit

October Term, 1973

No. 73-2322

D. C. Docket No. SA-71-CA-282

Patrick Resendis, Tony Escobedo, Wilburn White, Arturo Rodriguez and Elias Gonzales,

Plaintiffs-Appellants,

versus

Lee Way Motor Freight, Inc., et al.,

Defendants-Appellees.

Appeal from the United States District Court for the
Western District of Texas

Before Wisdom, Ainsworth and Godbold, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

November 25, 1974

Issued as Mandate:

APPENDIX J

United States Court of Appeals
Fifth Circuit

Edward W. Wadsworth, Clerk
Office of the Clerk
600 Camp Street
New Orleans, La. 70130
Telephone 504-589-6514

August 18, 1975

To All Counsel of Record

No. 73-2801—Jesse Rodriguez, et al. v. East Texas Motor Freight, et al.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition(s)* for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

---

* Filed by Local Union 657, Southern Conference of Teamsters and East Texas Motor Freight.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours

EDWARD W. WADSWORTH, Clerk

/s/ CLARE F. SACHS
Deputy Clerk

cc: Mr. Jim Heidelberg

Ms. Debra Millenson

Mr. Theo. F. Weiss

Messrs. Richard C. Hotvedt
Harry A. Rissetto

Messrs. George E. Seay
William Strock

Messrs. Edward W. Penshorn
Bradford F. Miller

Messrs. G. Wm. Baab
L.N.D. Wells, Jr.
Hall Gillespie

APPENDIX K

United States Court of Appeals
Fifth Circuit
Office of the Clerk

Edward W. Wadsworth
Clerk

600 Camp Street
New Orleans, La. 70130
Telephone 504-589-6514

August 18, 1975

To All Counsel of Record

No. 73-2322—Patrick Resendis, et al. v. Lee Way Motor Freight, Inc., et al.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition(s) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours

EDWARD W. WADSWORTH
Clerk

/s/ by CLARE F. SACHS
Deputy Clerk

cc: Messrs. Harry A. Nass, Jr.
Ruben Montemayor

Mr. Theo F. Weiss

Messrs. Paul Scott Kelly, Jr.
Raymond F. Beagle, Jr.

Messrs. Edward W. Penshorn
Bradford F. Miller

Messrs. G. William Baab
Hal K. Gillespie
L.N.D. Wells, Jr.

* Filed by Lee Way Fotor Freight, Inc., Local Union 657 and Southern Conference of Teamsters.

APPENDIX L

United States Court of Appeals
Fifth Circuit

Office of the Clerk
Edward W. Wadsworth
Clerk

600 Camp Street
New Orleans, La. 70130
Telephone 504-589-6514

August 18, 1975

To All Counsel of Record

No. 73-2254—Ernest Herrera, et al. v. Yellow Freight System, Inc., et al.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition(s)* for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied. See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours

EDWARD W. WADSWORTH
Clerk
By CLARE F. SACHS
Deputy Clerk

cc: Messrs. Harry A. Nass, Jr.
Ruben Montemayor

Mr. Theo F. Weiss

Messrs. Paul Scott Kelly
Raymond F. Beagle, Jr.

Messrs. Edward W. Penshorn
Bradford F. Miller

Messrs. G. William Baab
Hal K. Gillespie

* Filed by Local Union 657, Yellow Freight System, Inc., and Southern Conference of Teamsters.

Supreme Court, U. S.
FILED
AUG 11 1976
MICHAEL RODAK, JR., CLERK

JOINT APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-651

TEAMSTERS LOCAL UNION 657, *Petitioner*,
v.
JESSE RODRIGUEZ, MODESTO HERRERA, SADRACH G. PEREZ,
Respondents,

and

No. 75-715

SOUTHERN CONFERENCE OF TEAMSTERS, *Petitioner*,
v.
JESSE RODRIGUEZ, MODESTO HERRERA, SADRACH G. PEREZ,
Respondents,

and

No. 75-718

EAST TEXAS MOTOR FREIGHT SYSTEM, INC., *Petitioner*,
v.
JESSE RODRIGUEZ, MODESTO HERRERA, SADRACH G. PEREZ,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI IN NO. 75-651 FILED OCTOBER 24, 1975

PETITION FOR A WRIT OF CERTIORARI IN NO. 75-715 FILED NOVEMBER 13, 1975

PETITION FOR A WRIT OF CERTIORARI IN NO. 75-718 FILED NOVEMBER 14, 1975

CERTIORARI GRANTED MAY 24, 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-651

TEAMSTERS LOCAL UNION 657, *Petitioner,*

v.

JESSE RODRIGUEZ, MODESTO HERRERA, SADRACH G. PEREZ, *Respondents,*

and

No. 75-715

SOUTHERN CONFERENCE OF TEAMSTERS, *Petitioner,*

v.

JESSE RODRIGUEZ, MODESTO HERRERA, SADRACH G. PEREZ, *Respondents,*

and

No. 75-718

EAST TEXAS MOTOR FREIGHT SYSTEM, INC., *Petitioner,*

v.

JESSE RODRIGUEZ, MODESTO HERRERA, SADRACH G. PEREZ, *Respondents.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DOCKET ENTRIES: Page

Pleadings, Findings, or Opinions 1

Plaintiffs' Original Complaint 7

Answer of Southern Conference of Teamsters 20

Amended Answer of Teamsters Local 657 22

Answer of East Texas Motor Freight 28

First Amended Answer of East Texas Motor Freight 34

Motion to Reopen Record with Affidavit of R. C. Shafer and G. Hardeman and Exhibit B 44

JUDGMENTS IN QUESTION:

Finding of Fact and Conclusions of Law of the District Court of the United States for the Western District of Texas, San Antonio Division 55

Opinion of the Court of Appeals for the Fifth Fifth Circuit in *Rodriguez* v. *East Texas Motor Freight,* November 25, 1974 68

Order from Court of Appeals for the Fifth Circuit Denying Petitions for Rehearing 112

TRANSCRIPT OF PROCEEDINGS Held before the Honorable John H. Wood, Jr., in the United States District Court for the Western District of Texas, San Antonio Division, on January 29, 1973

Stipulations by Mr. Weiss [5] 113

Stipulations by Mr. Baab [10] 115

Testimony of Jesse Rodriguez
Direct Examination by Mr. Heidelberg [21] .. 117
Cross Examination by the Court [30] 120
Cross Examination by Mr. Weiss [32] 122

Page

Testimony of Modesto Herrera
Direct Examination by Mr. Heidelberg [45] .. 124

Colloquy among Court, Mr. Weiss, and Mr. Heidelberg [69] 128

Testimony of Trinidad Gomez
Direct Examination by Mr. Heidelberg [72] 130
Cross Examination by Mr. Weiss [75] 131
Cross Examination by the Court [83] 133

Testimony of Sadrach G. Perez
Direct Examination by Mr. Heidelberg [86] 134
Cross Examination by Mr. Penshorn [131] .. 137

Testimony of Ed A. Asbury
Direct Examination by Mr. Weiss [141] 140
Cross Examination by Mr. Heidelberg [156] 141

Colloquy between Court and Mr. Baab [178] 142

Testimony of W. C. Smith
Direct Examination by Mr. Baab [180] 142
Cross Examination by Mr. Heidelberg [190] 148
Redirect Examination by Mr. Baab [201] .. 155
Recross Examination by Mr. Heidelberg [203] 157

Testimony of Ezra A. Beierle
Direct Examination by Mr. Weiss [216] 157
Cross Examination by Mr. Heidelberg [220] 159

Testimony of H. L. Johnson
Direct Examination by Mr. Seay [231] 160
Examination by the Court [262] 174
Redirect Examination by Mr. Seay [264] 175

Testimony of R. W. Huffman
Direct Examination by Mr. Seay [273] 176
Cross Examination by Mr. Heidelberg [286] 180

Page

Testimony of Robert H. Maier
Direct Examination by Mr. Rissetto [300] .. 181
Cross Examination by Mr. Heidelberg [320] 189
Redirect Examination by Mr. Rissetto [328] 192
Recross Examination by Mr. Heidelberg [329] 192

Colloquy among Court, Mr. Penshorn, and Mr. Heidelberg [332] 193

Testimony of Ray C. Shafer
Cross Examination by Mr. Heidelberg [334] 195

Post Trial Proceedings [339] 197

INCORPORATED TESTIMONY OF W. C. SMITH in the Proceeding of *Herrera, et al.* v. *Yellow Freight System, Inc., et al.*, No. SA-71-CA-296 (United States District Court for the Western District of Texas) [17] 204

DEPOSITIONS

Everett E. Cloer [4] 225
Sadrach G. Perez [3] 238
Jesse Rodriguez [5] 270
Modesto Herrera [3] 289
Harold White [5] 301
Ed A. Asbury [13] 311
Ezra A. Beierle [15] 313

EAST TEXAS MOTOR FREIGHT'S ANSWERS TO INTERROGATORIES 315

PLAINTIFFS' EXHIBITS

Exhibit 1—EEOC Findings of Fact 318

Exhibit 5—Letter from J. Rodriguez to W. N. Sager 324

Page

Exhibit 6—Letter from S. G. Perez to W. N. Sager 325

Exhibit 7—Letter from M. Herrera to W. N. Sager 326

Exhibit 8—Letter from T. Gomez to W. N. Sager 327

Exhibit 9—Letter from S. G. Perez, et al., to F. Fitzsimmons 327

Exhibit 10—Letter from F. Fitzsimmons to S. G. Perez 330

Exhibit 15—National Master Freight Agreement, 4/1/70 - 6/30/73, with Southern Conference Area Over-the-Road Supplement (selected articles) 331

Exhibit 16—National Master Freight Agreement, 4/1/70 - 6/30/73, with Southern Conference Area Local Cartage Supplements (selected articles) 331

Exhibit 16—National Master Freight Agreement, 4/1/70 - 6/30/73, with Southern Conference Area Local Cartage Supplements (selected articles) 342

Exhibit 21—Compliance Review 352

DEFENDANTS' EXHIBITS

Exhibit AAA—Graph—Intercity Line Accidents _ 416

Exhibit FFFF—Stipulation 417

Exhibit L—Racial Composition of Collective Bargaining Unit Represented by Local Union 657. 420

Exhibit M—Racial Composition of Total Membership of Teamsters Local 657 421

Page

Exhibit N—Racial Breakdown of Truck Drivers Working for East Texas Motor Freight within Jurisdiction and Membership of Teamsters Local 657 422

Exhibit P—Charter of Local 657 423

CONSENT DECREE

United States v. *East Texas Motor Freight, et al.*, Civ. No. 3-6025-B (N.D. Tex. Feb. 19, 1974) .. 424

STATUTES

Civil Rights Act of 1964 as Amended

29 U.S.C. § 158(b)(3) 448
29 U.S.C. § 159(a) 448
42 U.S.C. § 1981 449
Title VII, § 703(a)-(j) 449

RODRIGUEZ v. EAST TEXAS MOTOR FREIGHT

Date Proceedings

10-26-71— 1. Complaint, filed.

10-26-71— summons issued,

11-5-71 — 2. Summons (Shafer) re/ex 11-4-71 by Sifuentes, DUSM

11-9-71 — 3. Plaintiffs' Initial Request for Admissions, filed.

11-3-71 — 4. Summons (Johngon) re/ex 10-28-71 by Woodard, DUSM

11-3-71 — 5. Summons (Miller) re/ex 11-1-71 by Woodard, DUSM

11-11-71— 6. Motion of Defendant ETMF to Enlarge Time for Answer, filed.

11-16-71— 7. Order Enlarging Time, filed.

11-17-71— 8. Plaintiffs' Reply to Defendant's Motion to Enlarge Time, filed.

11-22-71— 9. Answer of Defendant Southern Conference of Teamsters, filed.

11-24-71—10. Answer of Local 657, filed.

12-14-71—11. Response of Defendant ETMF to Initial Request for Admissions, filed.

12-17-71—12. Answer of ETMF filed.

12-21-71—13. Order Preliminary to Pretrial Conference, filed.

12-28-71—14. Designation of Resident Attorney, filed.

2-10-72 —15. Plaintiff's First Set of Interrogatories, filed.

3-27-72 —16. ETMF Answers to Plaintiffs' First Set of Interrogatories, filed.

4-19-72 —17. ORDER Granting Extension of Time, filed.

4-18-72 —18. Joint Motion to Extend Time, filed.

9-15-72 —19. Interrogatories to Modesto Herrera, filed.

9-15-72 —20. Interrogatories to Perez, filed.

9-15-72 —21. Interrogatories to Rodriguez, filed.

9-19-72 —** Docket Call Discovery to be completed by Dec. 1972—Set for Non Jury Trial for January 29, 1973

9-27-72 —22. ORDER Setting time for discovery, date of trial, filed, also granting leave to amend to both parties

10-16-72—23. Answers to Interrogatories by Rodriguez, filed.

10-16-72—24. Answers to Interrogatories by Modesto Herrera, filed.

10-16-72—25. Answers to Interrogatories by Perez, filed.

11-1-72 —26. Motion by Plaintiffs to Transfer Venue, filed.

11-1-72 —27. Plaintiffs' Brief in Support of Motion to Transfer, filed.

11-6-72 —28. Opposition of Defendant East Tex Motor Freight to Motion to Transfer Venue, filed.

11-7-72 —29. Reply of Local 657 to Plaintiffs Motion to Transfer Venue, filed.

11-7-72 —30. Brief in Support of Local 657's Opposition, filed.

11-8-72 —31. Reply of Southern Conference of Teamsters to Motion to Transfer Venue, filed.

11-9-72 —32. Brief of Defendant ETMF in Support of Opposition to Motion to Transfer, filed.

11-17-72—33. ORDER Denying Motion for Transfer of Venue, filed.

11-20-72—34. Supplemental Brief, filed.

12-18-72—35. Amended Answer of Defendant Local 657, filed.

12-19-72—36. First Amended Answer of Defendant ETMF filed.

12-26-72—37. Plaintiff's Request for Admissions, filed.

1-3-73 —38. ORDER Extending Time, filed.

1-2-73 —39. Notice of Deposition of Willis, filed.

1-15-73 —40. Deposition of Modesto Herrera, filed.

1-23-73 —41. Depositions of Asbury and Bierle, filed.

1-23-73 —42. Deposition of Rodriguez, filed.

1-23-73 —43. Deposition of Perez, filed.

1-24-73 —44. Supplement to Memo of Defendant ETMF, filed.

1-19-73 —45. Supplement to Plaintiffs' List of Witnesses —Exhibit 10 to Proposed PreTrial Order, filed.

1-19-73 —46. Supplement to Plaintiffs' List of Exhibits— Exhibit 2 to Proposed PreTrial Order, filed.

1-26-73 —47. Depositions of Raymond C. Shafer, filed.

1-29-73 —** Non Jury Trial commenced—Brief opening statement made by Plaintiffs' attorney.

1-29-73 —Witnesses sworn and testimony for Plaintiffs began.

1-29-73 —All exhibits for Plaintiffs and Defendants admitted in evidence.

1-29-73 —Defendant ETMF Exhibits attached to Depositions and made part of record.

1-29-73 —Portions of Deposition of Harold Preston White read by Plaintiffs' attorney.

1-29-73 —Plaintiffs rest.

1-29-73 —Witnesses sworn and Defendants' testimony begun—Trial to resume tomorrow at 9:30.

1-29-73 —48. Plaintiffs' Proposed Pre Trial Order, filed.

1-29-73 —49. Proposed Pre Trial Order of Defendant East Texas Motor Freight, filed.

1-29-73 —50. Local Union 657's Proposed Pre Trial Order, filed.

1-29-73 —51. Defendant Southern Conference's Proposed Pre Trial Order, filed.

1-29-73 —52. List of Witnesses for Plaintiffs and for Defendants, filed.

1-29-73 —53. Subpoena (Thomas Salinas) re/ex by Plaintiff's attorney.

1-29-73 —54. Subpoena (Gomez) re/ex by Plaintiff's attorney.

1-30-73 —** Non Jury trial resumed—Additional witnesses sworn—Defendants testimony continue.

1-29-73 —Certain Stipulations read and made part of record—ETMF rests.

1-29-73 —So. Conf. of Teamsters and Local 657 rest.

1-29-73 —Rebuttal witness for Plaintiffs—Plaintiffs rest.

1-29-73 —Stipulation presented as Defendants' Exhibit FFFF.

1-29-73 —Briefs to be submitted by March 1, 1973—Case taken under advisement.

2-01-73 —55. Transcript of Proceedings at the end of the Trial Jan. 30, 1973, filed.

1-29-73 —56. Deposition of Cloer, filed.

1-29-73 —57. Depositions of White and Cloer, filed.

2-23-73 —58. Motion to Reopen Case for Receipt of Further Evidence, filed.

3-1-73 —59. Post Trial Brief of Defendant ETMF filed.

3-1-73 —Post Trial Brief of Defendants Intn'l. and So. Conf. of Teamsters & Teamsters Local 657, filed in 71-296, paper No. 52.

3-6-73 —60. Plaintiffs' Reply to Local 657's Motion to Reopen Case for Receipt of Further Evidence, filed. (Copy Judge)

3-8-73 —61. Reply Brief of Teamsters Local Union 657 to Post Trial Brief of Plaintiffs filed.

3-12-73 —62. Reply Brief of Defendant Unions, filed.

3-12-73 —63. Defendant East Texas Motor Freight's Post-Trial Reply Brief, filed.

3-12-73 —64. Plaintiffs' Post Trial Reply Brief, filed.

—65. Plaintiffs Post Trial Brief, filed.

3-20-73 —66. Stipulation, filed.

3-22-73 —67. Findings of Fact and Conclusions of Law, filed.

3-22-73 —68. Judgment, filed.

4-2-73 —69. Plaintiffs' Motion to Amend Findings of Fact and Conclusions of Law, filed.

4-6-73 —70. Order Granting Plaintiffs' Motion to Amend Findings of Fact and Conclusions of Law, filed.

4-9-73 —71. Plaintiffs Brief in Support of Motion to Amend Findings of Fact, filed.

5-3-73 —72. Notice of Appeal, filed.

5-3-73 —73. Cost Bond, filed.

5-21-73 —74. Transcript of Proceedings of Jan 29 & Jan 30, 1973, filed.

6-5-73 —75. Order Granting Extension of Time for Transmission of Record and Docketing A, filed.

6-1-73 —76. Motion to Extend Time for Transmission of Record, filed.

FOR THE WESTERN DISTRICT OF TEXAS
IN THE UNITED STATES DISTRICT COURT
SAN ANTONIO DIVISION

(Caption Omitted in Printing)

SA 71 CA 302

CIVIL ACTION No. 2A71

CA 302

Complaint

(Filed: October 26, 1971)

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1343(4) providing for a cause of action under 42 U.S.C. § 1981. This is a suit in equity authorized and instituted pursuant to § 2000e-5(f) of Title VII of the Act of Congress known as the "Civil Rights Act of 1964" (42 U.S.C. § 2000e et seq. hereinafter referred to the the "Act"). Jurisdiction of this Court is invoked pursuant to Title VII to secure the protection and redress the deprivation of rights secured by the Act providing for injunctive and other relief against racial and national origin discrimination in employment.

2. Plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on their own behalf and on behalf of other Mexican-American and Black individuals who similarly have been denied equal employment opportunities by the defendants and additionally on behalf of Mexican-American and Black individuals who may, in the future, be denied equal employment opportunities by the defendants because of their national origin and race. These individuals who are similarly situated are persons who have been subjected to and who, in the future, may be subjected to the unlawful discriminatory practices, poli-

cies, customs and usages which have been instituted and/or maintained by the defendants as hereinafter more fully appears. The class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of the plaintiffs are typical of the claims of the class and plaintiffs adequately protect the interests of the class so represented. The defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief, award of back wages, or corresponding declaratory relief with respect to the class as a whole.

3. This is a proceeding for a preliminary and permanent injunction restraining the defendants, East Texas Motor Freight, Southern Conference of Teamsters, and Teamsters Local 657 from maintaining practices, policies, customs or usages which discriminate against plaintiffs and members of their class because of their national origin and race with respect to equal employment treatment.

This is also a proceeding for a declaratory judgment, pursuant to 28 U.S.C. § 2201 and § 2202, that these practices, policies, customs or usages instituted and maintained by the defendants are violative of rights secured by Title VII and by 42 U.S.C. § 1981.

4. (a) Plaintiff Jesse Rodriguez is a Mexican-American citizen of the United States and a resident of the City of San Antonio in the State of Texas. Jesse Rodriguez has been employed by the defendant, East Texas Motor Freight, as an in-city driver from September 21, 1965 to present in San Antonio, Texas. Mr. Rodriguez is a member in good standing of Teamsters Local 657, the Southern Conference of Teamsters, and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

(b) Plaintiff Sadrach G. Perez is a Mexican-American citizen of the United States and a resident of the City

of San Antonio in the States of Texas. Sadrach G. Perez was employed by the defendant, East Texas Motor Freight, as an in-city driver from November 11, 1959 to the date of his discharge on or about May 18, 1971. Mr. Perez is a member in good standing of Teamsters Local 657, the Southern Conference of Teamsters and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

(c) Plaintiff Modesto Herrera is a Mexican-American citizen of the United States and a resident of the City of San Antonio in the State of Texas. Modesto Herrera has been employed by the defendant, East Texas Motor Freight, as an in-city driver from September 1964 to present. Mr. Herrera is a member in good standing of Teamsters Local 657, the Southern Conference of Teamsters and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

5. (a) The defendant, East Texas Motor Freight, does business in the State of Texas and the City of San Antonio, and is an employer within the meaning of 42 U.S.C. § 2000e(b) in that it is engaged in an industry affecting commerce and employs more than twenty-five (25) persons. This defendant is also an employer within the meaning of 42 U.S.C. § 1981.

(b) The defendant, Southern Conference of Teamsters, is a labor organization within the meaning of 42 U.S.C. 2000e-(d) and (e) in that it is engaged in an industry affecting commerce and has more than twenty-five (25) members. Additionally, the Southern Conference of Teamsters is a regional organization of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and serves as the collective bargaining agent for the Teamsters Locals within its jurisdiction, including defendant Teamsters Local 657.

(c) The defendant, Teamsters Union Local 657 of the International Brotherhood of Teamsters, Chauffeurs,

Warehousemen and Helpers of America, is a labor organization within the meaning of 42 U.S.C. § 2000e(d) and (e) in that it is engaged in an industry affecting commerce and has more than twenty-five (25) members and, additionally, it serves as the local collective bargaining agent for the plaintiffs.

6. Prior and subsequent to July 2, 1965, the defendant, East Texas Motor Freight, has intentionally engaged in the following practices, policies, customs and usages made unlawful by Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq. and 42 U.S.C. § 1981) which have denied plaintiffs and members of their class equal employment opportunities because of their national origin and race, to wit:

(a) The defendant maintains a policy and practice of excluding its Mexican-American and Black city-driver employees from line driver or over-the-road job assignments throughout its system of business operation. Since the line driver positions are the higher paying driver positions with the defendant, the effect of this policy is to relegate the Mexican-American and Black city-driver employees and applicants to the lower paying jobs;

(b) The defendant maintains a policy of not allowing its in-city drivers to transfer to line driver positions without loss of accumulated company seniority for purposes of job bidding and layoff rights. The effect of such policy is to perpetuate the company's past and continuing practice of excluding otherwise qualified Mexican-American and Black in-city drivers from obtaining line driver positions;

(c) On information and belief, plaintiffs allege that the no-transfer of seniority policy mentioned in Paragraph 6(b) above is the product of certain sections of the collective bargaining agreement entered into by the defendant and the Southern Conference of Teamsters. In the alterna-

tive, plaintiffs allege that the defendant has entered into separate collective bargaining agreements with the Southern Conference of Teamsters, one for city drivers and another for road drivers, that have perpetuated the unfair employment practices mentioned in Paragraph 6(b) above;

(d) Plaintiffs further allege that the defendant has excluded Mexican-American and Black applicants for employment as line drivers as illustrated by the fact that while defendant has approximately 415 line drivers, they are exclusively Anglo;

(e) That defendant, by action of its San Antonio Terminal Manager, discriminated against and discharged plaintiff Sadrach G. Perez for the reason that Mr. Perez had filed a charge with the Equal Employment Opportunity Commission, such conduct being an express violation of 42 U.S.C. § 2000e-3;

(f) That defendant, by action of its San Antonio Terminal Manager, has been discriminating against and harassing plaintiff Jesse Rodriguez for the reason that Mr. Rodriguez had filed a charge with the Equal Employment Opportunity Commission, such conduct being an express violation of 42 U.S.C. § 2000e-3;

(g) That on numerous occasions the plaintiffs and members of the class have made verbal and written requests to be transferred to line driver positions to no avail; and

(h) That by its conduct described in Paragraph 6(a)-(f), the defendant has relegated its Mexican-American and Black in-city drivers to the lower paying driver positions with the company causing the plaintiffs and the class monetary loss and emotional stress.

7. Prior and subsequent to July 2, 1965, the defendant, Southern Conference of Teamsters, has intentionally engaged in the following practices, policies, customs and

usages made unlawful by Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) and 42 U.S.C. § 1981 which have denied plaintiffs and members of their class equal employment opportunities because of their national origin and race, to wit:

(a) On information and belief, the Southern Conference of Teamsters have initiated, maintained and perpetuated separate collective bargaining agreements for its line driver members and in-city driver members. The effect of these separate collective bargaining agreements has been to perpetuate the exclusion of Mexican-American and Black in-city drivers from transferring to line driver positions;

(b) That the separate collective bargaining agreements described in Paragraph 7(a) above have effectively resulted in the maintenance by the defendant of dual lines of seniority in its representation of the employees of East Texas Motor Freight with the attendant effect of totally excluding Mexican-American and Black employees and applicants from line driver positions; and

(c) The defendant's acceptance of and acquiescence in the discriminatory conduct engaged in by East Texas Motor Freight described in Paragraph 6 above has caused plaintiffs and members of their class monetary loss and emotional stress.

8. Prior and subsequent to July 2, 1965, the defendant, Teamsters Local 657, has intentionally engaged in the following practices, policies, customs and usages made unlawful by Title VII of the 1964 Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) and 42 U.S.C. § 1981 which have denied plaintiffs and members of their class equal employment opportunities because of their national origin and race, to wit:

(a) That defendant's, Teamsters Local 657, acceptance of and acquiescence in the discriminatory conduct engaged in by East Texas Motor Freight and the Southern Conference of Teamsters, described in Paragraphs 6 and 7 above, despite numerous requests for assistance by plaintiffs and members of their class, constitutes a denial to plaintiffs and their class of equal employment opportunities; and

(b) That defendant's inclusion in the Local Freight Forwarding, Pickup and Delivery Supplemental Agreement entered into by East Texas Motor Freight and the Southern Conference of Teamsters pertaining to in-city drivers indicates defendant's intentional participation in the discriminatory policies and practices described in Paragraphs 6 and 7 above.

9. That prior and subsequent to July 2, 1965 all three parties defendant have intentionally acted in concert to create and maintain a system-wide exclusion of Mexican-American and Black persons from line driver positions at East Texas Motor Freight.

10. (a) On or about August 20, 1970, plaintiff Jesse Rodriguez filed a written charge under oath with the United States Equal Employment Opportunity Commission (hereinafter referred to as the EEOC) complaining of the practices described in Paragraphs 6(a)-(d) and 8 above, alleging that such practices constituted a continuing violation of the Act. On or about June 9, 1971, Jesse Rodriguez filed an amended charge with the EEOC complaining of the practice described in Paragraph 7 above.

On or about July 27, 1971, Jesse Rodriguez filed a second charge under oath with the EEOC alleging discrimination and harassment against him by the defendant, East Texas Motor Freight, based upon the fact that he had filed a previous charge with the EEOC, such charge constituting the basis for the allegations contained in Paragraph 6(f) above.

On or about October 6, 1971, Jesse Rodriguez sent a letter to the EEOC requesting that he be issued his thirty day "right-to-sue" letter for both charges. This letter was received by plaintiff on October 11, 1971, and the instant action has been timely filed.

(b) On or about February 26, 1971, plaintiff Sadrach G. Perez filed a written charge under oath with the EEOC complaining of the practices described in Paragraphs 6(a)-(d) and 8 above, alleging that such practices constituted a continuing violation of the Act. On or about June 7, 1971 Sadrach G. Perez filed an amended charge with the EEOC complaining of the practices described in Paragraph 7 above.

On or about June 7, 1971 Sadrach G. Perez filed a second charge under oath with the EEOC alleging that the defendant, East Texas Motor Freight, had discharged him on May 18, 1971, in retaliation for his filing of discrimination charges with the EEOC, such charge constituting the basis for the allegations contained in Paragraph 6(e) above.

On or about October 6, 1971, Sadrach G. Perez sent a letter to the EEOC requesting that he be issued his thirty day "right-to-sue" letter for both charges. This letter was received by plaintiff on October 13, 1971, by counsel, and the instant action has been timely filed.

(c) On or about March 11, 1971, plaintiff Modesto Herrera filed a written charge under oath with the EEOC complaining of the practices described in Paragraph 6(a)-(d) and 8 above, alleging that such practices constituted a continuing violation of the Act. On or about June 9, 1971, Modesto Herrera filed an amended charge with the EEOC complaining of the practices alleged in Paragraph 7 above.

On or about October 6, 1971, Modesto Herrera sent a letter to the EEOC requesting that he be issued his thirty day "right-to-sue" letter for this charge. This letter was

received by plaintiff on October 11, 1971 and the instant action has been timely filed.

(d) Neither the City of San Antonio nor the State of Texas have equal employment opportunity commissions which are to be deferred to pursuant to 42 U.S.C. § 2000e-5(b).

(e) All conditions precedent to the initiation of this suit under Title VII and 42 U.S.C. § 1981 have been complied with.

11. Plaintiffs and the class they represent have suffered and will continue to suffer irreparable injury by the practices, policies, customs and usages of the defendants complained of herein until the same are enjoined by this Court. Plaintiffs have no plain, adequate or complete remedy at law to redress the wrongs alleged herein and this suit for a preliminary and permanent injunction and declaratory judgment is their only means of securing adequate relief.

WHEREFORE, plaintiffs pray that this Court advance this case on the docket, order a speedy hearing at the earliest practicable date, cause this case to be in every way expedited and upon such hearing to:

12. Declare that this action is properly maintainable as a class action under the appropriate provisions of Rule 23 of the Federal Rules of Civil Procedure. Concurrently, that the appropriate class should consist of all defendants, East Texas Motor Freight's Mexican-American and Black in-city drivers included in the collective bargaining agreement entered into between East Texas Motor Freight and the Southern Conference of Teamsters covering the State of Texas. Additionally that such class should properly be composed of all Mexican-American and Black applicants for line driver positions with East Texas Motor Freight included in the above area covered by the Southern Conference of Teamsters from July 2, 1965 to present.

13. Grant plaintiffs a preliminary and permanent injunction enjoining the defendants and their agents, successors, employees, and those actively in concert with them and at their direction from continuing to maintain practices, policies, customs or usages which discriminate against plaintiffs and members of their class because of their race and national origin with respect to equal employment opportunity, and more specifically, to order East Texas Motor Freight, Southern Conference of Teamsters and Teamsters Local 657 to immediately initiate the following preliminary affirmative action pending final disposition of this suit:

(a) To immediately reinstate plaintiff, Sadrach G. Perez, to his former position of in-city driver;

(b) To enjoin East Texas Motor Freight, the Southern Conference of Teamsters and Teamsters Local 657, their agents, officers, and employees from engaging in any form of harassment, intimidation, and coercion of the named plaintiffs and members of their class because of plaintiffs' actions in filing charges with the Equal Employment Opportunity Commission and, additionally, their action in filing the instant complaint;

(c) To enjoin East Texas Motor Freight from continuing its present policy of requiring an in-city driver to resign from his in-city position and suffer loss of his accumulated company seniority for line driver job bidding and layoff purposes if an in-city driver chooses to transfer to a line driver position. Concurrently to enjoin the defendants, Southern Conference of Teamsters and Teamsters Local 657, from preventing East Texas Motor Freight's efforts to suspend the operation of the loss-of-seniority policy, if such policy is preliminarily enjoined by this Court;

(d) To affirmatively require East Texas Motor Freight to publicize the pendency of the instant suit at all of East Texas Motor Freight's line driver and in-city terminals located in the State of Texas by specifically doing the following:

(1) Posting notices in conspicuous locations at each such East Texas Motor Freight Terminal, such notice describing the nature of the instant suit and informing defendant's Mexican-American and Black in-city drivers of their right to transfer to line driver positions without loss of seniority, such form of notice to be approved by the Court; and

(2) Additionally to inform defendant's Mexican-American and Black in-city drivers of their right to participate in the instant suit by submitting a form, to be approved by the Court, and sent to the United States District Clerk's Office for the Western District of Texas, San Antonio Division, such form to be made available by East Texas Motor Freight and distributed to all of its Mexican-American and Black in-city drivers.

(e) To affirmatively require East Texas Motor Freight to hire Mexican-American and Black individuals for line driver openings at all of its line driver terminals at a ratio of one Mexican-American or Black for each Anglo so hired; these Mexican-American and Black line driver new hires should initially be chosen from East Texas Motor Freight's Mexican-American and Black in-city drivers who request such transfer, specifically the named plaintiffs and secondly from the list of Mexican-American and Black applicants on file at all of East Texas Motor Freight's terminals and offices;

(f) To affirmatively require that East Texas Motor Freight post in conspicuous places a list of all line driver openings at each of its in-city and line driver terminals, such list to be up-dated every fifteen (15) days;

(g) To enjoin East Texas Motor Freight from destroying any line driver applications presently in its custody submitted by Mexican-American and Black in-city drivers and applicants;

(h) To affirmatively require East Texas Motor Freight to merge its line driver and city driver seniority lists so as to provide for a singular seniority system based solely upon an employee's anniversary date with the company. Furthermore, to enjoin the defendants, Southern Conference of Teamsters and Teamsters Local 657, from engaging in any conduct that would hinder East Texas Motor Freight's efforts to effect the above-mentioned merger of seniority lists.

14. Grant plaintiffs and members of their class, upon final disposition of this cause, a permanent injunction enjoining East Texas Motor Freight, the Southern Conference of Teamsters and Teamsters Local 657 from continuing the policies and practices heretofore described in Paragraphs 6, 7 and 8 above and, furthermore, to affirmatively require defendant to permanently implement those aspects of preliminary relief requested in Paragraph 13 above.

15. Grant the plaintiffs and members of their class a declaratory judgment that the practices, policies, customs and usages complained of herein are violative of rights protected by Title VII and 42 U.S.C. § 1981.

16. Grant the plaintiffs and each member of the class plaintiffs represent all wages lost as a result of the practices, policies, customs and usages maintained by the defendants.

17. Grant the plaintiffs and members of their class their costs herein including reasonable attorneys' fees and grant such further, additional or alternative relief as may appear to the Court to be equitable and just.

18. Grant the plaintiffs and members of their class an award of punitive damages, to be severally shared by all defendants, in the amount of $100,000.00 for the purposeful conduct of defendants in subjecting plaintiffs and their class to the humiliation and emotional stress attend-

ant to defendants' discriminatory practices and policies and, furthermore, for the willful and intentional harassment of the plaintiffs solely because of their action in filing charges of discrimination against defendants with the United States Equal Employment Opportunity Commission.

19. Plaintiffs further pray that this Court maintain continuing jurisdiction of this matter to insure continued compliance by the defendants with any final Order entered in this cause.

Respectfully submitted,

/s/ Jim Heidelberg
MARIO OBLEDO
ED IDAR, JR.
JOHN SERNA
JIM HEIDELBERG

MEXICAN-AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND
319 Aztec Building
211 E. Commerce
San Antonio, Texas 78205
Attorneys for Plaintiffs

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NOTE: Portion of Record Omitted, Filed In Its Original Form.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL ACTION NO. SA-71-302

(Caption Omitted in Printing)

Answer of Defendant
Southern Conference of Teamsters

FIRST DEFENSE

The complaint fails to state a claim against this defendant upon which relief can be granted.

SECOND DEFENSE

Plaintiffs lack standing to maintain a class action. Plaintiffs fail properly to define the class which they purport to represent.

THIRD DEFENSE

Plaintiffs did not file timely charges with the Equal Employment Opportunity Commission.

FOURTH DEFENSE

The Equal Employment Opportunity Commission has not rendered its decision as to whether there was reasonable cause to believe the Civil Rights Act might have been violated by this defendant.

FIFTH DEFENSE

The Equal Employment Opportunity Commission has not completed efforts to attempt in any way to conciliate the instant dispute.

SIXTH DEFENSE

The suit is untimely filed.

SEVENTH DEFENSE

Plaintiffs may not raise issues not brought before the Equal Employment Opportunity Commission.

EIGHTH DEFENSE

1. This defendant admits the jurisdiction of the Court as set out in paragraph 1 of the complaint, admits paragraphs 3, 5(a), 5(b) [except the last sentence thereof], 5(c) and 10(d) of the complaint.

2. Defendant denies the allegations of paragraphs 2, 6, including the subdivisions thereof, 7, including the subdivisions thereof, 8, including the subdivisions thereof, 9, 10, including the subdivisions thereof, and 11 of the complaint.

Respectfully submitted,

MULLINAX, WELLS, MAUZY & BAAB, INC.
1601 National Bankers Life Bldg.
Dallas, Texas 75201—741-4656

/s/ By L. N. D. WELLS, JR.
L. N. D. Wells, Jr.

Attorneys for Defendant,
Southern Conference of Teamsters

(Certificate of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL ACTION NO. SA-71-CA-302

(Caption Omitted in Printing)

Amended Answer of Defendant
Local Union 657

FIRST DEFENSE

1. The complaint fails to state a claim against this Defendant upon which relief can be granted.

SECOND DEFENSE

2. Plaintiffs' complaint should be dismissed for failure to join necessary and indispensable parties.

THIRD DEFENSE

3. The complaint against Local 657 under 42 U.S.C. 1981 is barred pursuant to 28 U.S.C. 1652 and 42 U.S.C. 1988, by applicable statutes of limitation and laches.

FOURTH DEFENSE

4. The complaint against Local 657 under 42 U.S.C. 2000(e) is untimely filed.

FIFTH DEFENSE

5. Plaintiffs did not timely file charges with the Equal Employment Opportunity Commission.

SIXTH DEFENSE

6. Plaintiffs did not file charges against Local 657 with the Equal Employment Opportunity Commission.

SEVENTH DEFENSE

7. The Equal Employment Opportunity Commission has not rendered its decision as to whether there was reasonable cause to believe the Civil Rights Act might have been violated.

EIGHTH DEFENSE

8. The Equal Employment Opportunity Commission has not attempted in any way to conciliate, nor completed efforts to conciliate the instant dispute.

NINTH DEFENSE

9. Plaintiffs may not raise issues in this Court not brought before the Equal Employment Opportunity Commission.

TENTH DEFENSE

10. This Defendant has no right or authority to determine the provisions of collective bargaining agreements with employers, except as authorized and approved by its members. None of Plaintiffs have ever requested or authorized negotiation of contractual rights to transfer to or bid on road driver jobs with company seniority outside the representation jurisdiction of Local 657. All contracts between Local Union 657 and East Texas Motor Freight have been approved and ratified prior to the signing thereof by Defendant. Plaintiffs, therefore, have waived and are estopped to claim any relief as against this Defendant by reason of the no-transfer rule or operational effects of separate contracts for road and city drivers.

ELEVENTH DEFENSE

11. No collective bargaining agreement between this Defendant and East Texas Motor Freight has ever precluded Plaintiffs' employment as road drivers, or their transfer to road driver jobs with company seniority.

Twelfth Defense

12. The National Labor Relations Act, 29 U.S.C., Section 159(a), restricts this Defendant to the representation of employees who have designated it as their bargaining representative. This act further restricts the scope of this representation authority to job classification at East Texas Motor Freight terminals within this Defendant's representation jurisdiction. East Texas Motor Freight has never had road driver jobs at any of its terminals within the representation jurisdiction of this Defendant.

Thirteenth Defense

13. This Defendant has never been a party to a collective bargaining agreement with East Texas Motor Freight covering road driver jobs.

Fourteenth Defense

14. The hiring practices of East Texas Motor Freight are matters over which this Defendant is restricted, as a matter of law, in regulating, or attempting to regulate, by reason of the prohibitions of the National Labor Relations Act, 29 U.S.C., Section 164(b), and the Texas Right To Work Law, Article 5207A, Revised Civil Statutes of Texas.

Fifteenth Defense

15. The majority of the employees who make up the collective bargaining unit, of which Plaintiffs are a part, are Mexican-Americans and Negroes. This bargaining unit sets all policies and demands of Defendant Local 657 relative to their working conditions or contractual rights as employees. No member of this bargaining unit, including the Plaintiffs, has ever raised any issue of racial discrimination by this Defendant. Nor has any member of the bargaining unit ever moved for action by this Defendant to change the policies and practices of East Texas Motor Freight of which Plaintiffs complain. Accordingly, these Plaintiffs are

now estopped to complain that this Defendant has "accepted" and "acquiesced" in alleged discriminatory policies and practices of East Texas Motor Freight.

Sixteenth Defense

16. This case cannot be maintained as a class action against this Defendant for the following reasons:

(a) The Claims of the Plaintiffs to road driver jobs are not typical of the claims of the class they seek to represent.

(b) Plaintiffs cannot fairly represent the class because the relief sought conflicts with existing legal rights of other members of the class.

(c) There has been no conduct or actions by this Defendant which are applicable to a class consisting of all Negro and Mexican-American city drivers in Texas. This Defendant has never had representation jurisdiction of the entire class, and all of its actions and conduct, relative to road driver jobs, has been limited to employees within its representation jurisdiction. Accordingly, Plaintiffs' complaint does not meet the requirements of Rule 23(b)(2), Federal Rules of Civil Procedure.

(d) Plaintiffs, being all residents of San Antonio and all members of this Local Union, do not constitute a representative group for the purpose of maintaining a class action for the entire State of Texas.

(e) The geographical scope of Plaintiffs' class which includes the entire State of Texas is too large for the maintenance of this action under Rule 23.

Seventeenth Defense

17. The discharge of the Plaintiff Sadrach Perez by East Texas Motor Freight, and this Defendant's representation of Perez in such matter, have already been the

subject of an arbitration proceeding and a complaint filed with the National Labor Relations Board, both of which resulted in rulings adverse to Plaintiff Perez.

Any alleged harassment of the Plaintiff Jesse Rodriguez by East Texas Motor Freight, brought to the attention of this Defendant, has been protested by it.

Eighteenth Defense

18. This Defendant is neither an indispensable or necessary party to Plaintiffs' claims for employment rights outside the geographical and representation jurisdictions of this Defendant, and should be dismissed as to such claims.

Nineteenth Defense

19. This Defendant has not discriminated against Plaintiffs because of their race, color or national origin.

Twentieth Defense

20. This Defendant admits the allegations as to the jurisdiction of the Court as set out in the first and second sentences of paragraph 1 of the complaint. As to the remaining allegations contained in paragraph 1, to the extent they are conclusions of law, their validity is denied; to the extent they are statements of fact, they are denied.

21. This Defendant admits the allegations of paragraphs 3, 5(a), 5(b) except the last sentence thereof which is denied, 5(c) and 10(d) of the complaint.

22. This Defendant admits the allegations of paragraph 4 of the complaint, except those allegations as to dates of employment which are denied, and the second sentence of paragraph 4(b), which is also denied.

23. This Defendant denies the allegations of paragraphs 2; 6 including subdivisions (a) thru (h) thereof; 7 including the subdivisions (a) thru (c) thereof; 8 including subdivisions (a) and (b) thereof; 9; 10 including subdivisions (a)(b)(c) and (e) thereof; and 11 of the complaint.

Respectfully submitted,

Edward W. Penshorn
Bradford F. Miller
519 Majestic Building
San Antonio, Texas 78205

/s/ Edward W. Penshorn
Of Counsel

(Certificate of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL ACTION No. SA-71-302

(Caption Omitted in Printing)

Answer

East Texas Motor Freight, one of the Defendants in the above-entitled action, for answer to the Complaint herein says:

1. Answering paragraph 1 of the Complaint, the Defendant denies the allegations in this paragraph insofar as they state conclusions of law, *i.e.*, that the court has jurisdiction over this Complaint pursuant to either 28 U.S.C. § 1343(4), 42 U.S.C. § 1981 or 42 U.S.C. § 2000e *et seq.*

2. Answering paragraph 2 of the Complaint, the Defendant denies the allegations of fact and conclusions of law in this paragraph.

3. Answering paragraph 3, subparagraph 1, of the Complaint, the Defendant admits that this is a proceeding for a preliminary and permanent injunction. However, the Defendant denies the allegations of fact and conclusions of law in the remainder of the subparagraph.

4. Answering the second subparagraph of paragraph 3 of the Complaint, the Defendant denies the conclusions of law and allegations of fact contained in the paragraph.

5. Answering subparagraph (a) of paragraph 4 of the Complaint, the Defendant admits the second sentence in the subparagraph, but has insufficient knowledge or information to form a belief as to the truth of the first and third sentences in the paragraph. Additionally, the Defendant

would note that the individual Plaintiff is denominated as "Jesus" Rodriguez on the Defendant's employment records.

6. Answering subparagraph 4(b) of the Complaint the Defendant admits the second sentence in the subparagraph but has insufficient knowledge or information to form a belief concerning the truth of the first and third sentences in the subparagraph.

7. Answering subparagraph 4(c) the Defendant admits the second sentence in the subparagraph except that the individual Plaintiff became a full-time employee of East Texas Motor Freight on May 3, 1965. The Defendant is without sufficient knowledge or information to form a belief as to the truth of the first and third sentences in subparagraph 4(c).

8. Answering subparagraph 5(a) of the Complaint, the Defendant admits the first sentence in the subparagraph but denies the allegations in the second sentence of the subparagraph.

9. Answering subparagraph 5(b) of the Complaint, the Defendant is without sufficient knowledge or information to form a belief concerning the truth of the allegations in the subparagraph.

10. Answering subparagraph 5(c) of the Complaint, the Defendant is without sufficient knowledge or information to form a belief concerning the truth of the allegations in the subparagraph.

11. Answering the prefatory subparagraph of paragraph 6 of the Complaint, the Defendant denies the allegations in the prefatory subparagraph.

12. Answering subparagraph 6(a) of the Complaint, the Defendant denies the allegations in the subparagraph.

13. Answering subparagraph 6(b) the Defendant admits the allegations in the first sentence of the subpara-

graph except that Defendant's policy is not to permit transfer under any circumstances but denies the allegations in the second sentence of subparagraph.

14. Answering subparagraph 6(c) of the Complaint, the Defendant denies the allegations of the subparagraph except that it admits that it is a party to separate collective bargaining agreements for in-city and road drivers.

15. Answering subparagraph 6(d) of the Complaint, the Defendant denies the allegations in the subparagraph except that it admits that it employs approximately 824 line (road) drivers.

16. Answering subparagraph 6(e) of the Complaint, the Defendant denies the allegations in the subparagraph except that it admits that it discharged Plaintiff Sadrach G. Perez on May 18, 1971.

17. Answering subparagraph 6(f) of the Complaint, the Defendant denies the allegations in the subparagraph.

18. Answering subparagraph 6(g) of the Complaint, the Defendant denies the allegations in the subparagraph except that Company records indicate that on or about August 21, 1970, the individual plaintiffs submitted letters to the Defendant's terminal manager at the San Antonio terminal applying for road or line driver jobs.

19. Answering subparagraph 6(h) of the Complaint, the Defendant denies the allegations in the subparagraph.

20. Answering paragraph 7 of the Complaint, the Defendant is without sufficient knowledge or information to form a belief concerning the truth of the allegations in the paragraph.

21. Answering paragraph 8 of the Complaint, the Defendant is without sufficient knowledge or information to form a belief concerning the truth of the allegations in paragraph 8.

22. Answering paragraph 9 of the Complaint, the Defendant denies the allegation in the paragraph.

23. Answering the allegations in paragraph 10(a) of the Complaint, the Defendant is without sufficient knowledge or information to form a belief with respect to the truth of the allegations in paragraph 10(a) of the Complaint except that the Defendant denies the last sentence in the third subparagraph of paragraph 10(a) insofar as that sentence constitutes a conclusion of law.

24. Answering subparagraph 10(b) of the Complaint, the Defendant is without sufficient knowledge or information to form a belief with respect to the truth of subparagraph 10(b) of the Complaint, except that with respect to the last sentence of the third paragraph of subparagraph 10(b) the Defendant denies the allegations in that sentence insofar as they constitute conclusions of law.

25. Answering subparagraph 10(c) of the Complaint, the Defendant is without sufficient information or belief to answer the allegations in the subparagraph except that with respect to the second sentence in the second paragraph of the subparagraph, the Defendant denies the allegations in the sentence insofar as they constitute a conclusion of law.

26. Answering subparagraph 10(d) of the Complaint, the Defendants admits the allegations in subparagraph 10(d).

27. Answering subparagraph 10(c) of the Complaint, the Defendant is without sufficient information or knowledge to form a belief with respect to the truth of the allegations in this paragraph, except that it denies the allegations in subparagraph insofar as they constitute a conclusion of law.

28. Answering paragraph 11 of the Complaint Defendant denies the allegations in paragraph 11.

DEFENSES

1. For a first, separate and distinct defense, arising upon the face of the Complaint herein, Defendant says that the facts alleged in said Complaint are insufficient to state a claim upon which relief can be granted.

2. For a separate and distinct defense arising from the face of the Complaint, the Defendant says that the Plaintiffs do not have standing to maintain a class action.

3. As a separate and distinct defense, the Defendant says that it appears on the Complaint herein that the Defendant has failed to join persons needed for a just adjudication of this Complaint. Rule 19, Federal Rules of Civil Procedure.

The joinder of those persons presently classified by the Defendant Company as over-the-road drivers is needed because they are so situated that the disposition of the action in their absence may, as a practical matter, impair or impede their ability to protect their seniority interests with the Defendant Company.

4. As a separate and distinct defense, the Defendant says that the court is without subject matter jurisdiction, because the Complaint alleges allegations of discrimination that were not related to the facts alleged in the charge filed with the EEOC.

5. For a separate and distinct defense, the Defendant says that the court is without subject matter jurisdiction. The Complainants have failed to satisfy the jurisdictional prerequisites for commencing an action under 42 U.S.C. § 2000e-5(f) because they failed to file a charge with the Equal Employment Opportunity Commission within 90 days of the alleged discriminatory occurrence.

6. For a separate and distinct defense, Defendant says that the Complaint fails to state a cause of action under 42 U.S.C. § 1981.

7. This Defendant has in no way violated the Civil Rights Act of 1964.

8. This Defendant has in no way discriminated against Plaintiffs or any of Plaintiffs.

WHEREFORE, this Defendant prays that Plaintiffs take nothing and that it go hence with its costs without day.

MORGAN, LEWIS & BOCKIUS
1140 Connecticut Avenue, N.W.
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/s/ By: THEO. F. WEISS
Theo. F. Weiss

Attorneys for Defendant
East Texas Motor Freight

(Certificate of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

(Caption Omitted in Printing)

CIVIL ACTION No. SA 71 CA 302

First Amended Answer of Defendant East Texas Motor Freight

EAST TEXAS MOTOR FREIGHT, one of the Defendants in the above entitled action, pursuant to leave of court duly had, files this its First Amended Answer in lieu of its answer heretofore filed herin, respectfully showing to the court:

1. This Defendant denies the allegations of Paragraph 1 of the Complaint insofar as they state conclusions of law, i.e., that the court has jurisdiction over this Complaint pursuant to 28 USC Section 1343(4), 42 USC 1981 or 42 USC Section 2000(e), et seq.

2. This Defendant denies the allegations in Paragraph 2 of the Complaint which apparently seeks to allege a class action under Rule 23, denying not only such allegations, but denying that this is a case within Rule 23.

3. Answering Paragraph 3, Subparagraph 1 of the Complaint this Defendant admits that Plaintiffs seek injunctive relief, but denies that Plaintiffs are entitled to same and denies the allegations of fact and conclusions of law in such subparagraph.

Answering Paragraph 3, Subparagraph 2 of the Complaint, this Defendant admits that Plaintiffs seek a declaratory judgment, but denies that Plaintiffs are entitled to any such relief and further denies that any practices, policies, customs or usages instituted or maintained by Defendant are violative of rights secured by Title VII or by 42 USC Section 1981.

4(a). Answering Paragraph 4(a) of the Complaint, this Defendant admits that Plaintiff Jesse Rodriguez (who is denominated in Defendant's personnel records "Jesus" Rodriguez) is a resident of San Antonio, Texas, is employed by Defendant in San Antonio, Texas and has been so employed since September, 1965, but Defendant lacks sufficient knowledge or information to admit or deny the remainder of the allegations of such paragraph.

4(b). Answering Paragraph 4(b) of the Complaint, this Defendant admits that Plaintiff Sadrach G. Perez is a resident of San Antonio, Texas and that he was employed by this Defendant from November 11, 1959 until he was discharged on or about May 18, 1971, but lacks sufficient knowledge or information to admit or deny the remainder of the allegations of such paragraph.

4(c). Answering Paragraph 4(c) of the Complaint, this Defendant admits that Plaintiff Modesto Herrera is a resident of San Antonio, Texas, has been employed as a full-time employee of this Defendant since May 3, 1965 and is presently employed by this Defendant, but lacks sufficient knowledge or information to admit or deny the remainder of the allegations of such paragraph.

5(a). Answering Paragraph 5(a) of the Complaint, this Defendant admits it is an employer within the meaning of 42 USC Section 2000(e)(b), is engaged in an industry affecting commerce and employs more than 25 persons. This Defendant denies that it is an employer within the meaning of 42 USC Section 1981.

5(b). Answering Paragraph 5(b) of the Complaint, this Defendant is without sufficient knowledge or information to form a belief concerning the truth of the allegations of such paragraph.

5(c). Answering Paragraph 5(c) of the Complaint, this Defendant is without sufficient knowledge or informa-

tion to form a belief concerning the truth of the allegations in such paragraph.

6. This defendant denies the first unnumbered subparagraph of Paragraph 6 of the Complaint.

6(a). This Defendant denies the allegations of Paragraph 6(a) of the Complaint.

6(b). This Defendant denies the allegations of Paragraph 6(b) except to admit that it does have a policy of not allowing in-city drivers to transfer to line driver positions without loss of accumulated company seniority for the purpose of job bidding and layoff rights, which policy is applicable to all drivers without regard to race, color, sex, religion or national origin.

6(c). This Defendant denies the allegations of Paragraph 6(c) of the Complaint except that it admits that it is a party to separate collective bargaining agreements for in-city and road drivers.

6(d). This Defendant denies the allegations of Paragraph 6(d) of the Complaint except that it admits that it employs approximately 824 line (road) drivers.

6(e). This Defendant denies the allegations of Paragraph 6(e) of the Complaint, stating, however, that Plaintiff Sadrach G. Perez was discharged for proper cause on May 18, 1971.

6(f). This Defendant denies the allegations of Paragraph 6(f) of the Complaint.

6(g). This Defendant denies the allegations of Paragraph 6(g) of the Complaint, except that company records at San Antonio, Texas indicate that in August, 1970, the Plaintiffs submitted letters to the Defendant's terminal manager at the San Antonio terminal applying for road or line driver jobs.

6(h). This Defendant denies the allegations of Paragraph 6(h) of the Complaint.

7. This Defendant is without sufficient knowledge or information to form a belief concerning the truth of the allegations of Paragraph 7 of the Complaint.

8. This Defendant is without sufficient knowledge or information to form a belief concerning the truth of the allegations concerning Paragraph 8 of the Complaint.

9. This Defendant denies the allegations of Paragraph 9 of the Complaint.

10(a). This Defendant is without sufficient knowledge or information to form a belief concerning the truth of the allegations of Paragraph 10(a) of the Complaint. This Defendant denies the conclusions of law embodied in such paragraph.

10(b). This Defendant is without sufficient knowledge or information to form a belief concerning the truth of the allegations of Paragraph 10(b) of the Complaint. This Defendant denies the conclusions of law embodied in such paragraph.

10(c). This Defendant is without sufficient knowledge or information to form a belief concerning the truth of the allegations of Paragraph 10(c) of the Complaint. This Defendant denies the conclusions of law embodied in such paragraph.

10(d). This Defendant admits that neither the City of San Antonio nor the State of Texas has equal employment opportunity commissions.

10(e). This Defendant is without sufficient information or knowledge to form a belief with respect to the truth of the allegations in Paragraph 10(e) of the Complaint. The conclusions of law embodied therein are denied.

11. This Defendant denies the allegations of Paragraph 11 of the Complaint.

12. This Defendant denies that Plaintiffs are entitled to the relief sought in Paragraph 12 of the Complaint.

13. This Defendant denies that Plaintiffs are entitled to the relief sought in Paragraph 13 of the Complaint.

14. This Defendant denies that Plaintiffs are entitled to the relief sought in Paragraph 14 of the Complaint.

15. This Defendant denies that Plaintiffs are entitled to the relief sought in Paragraph 15 of the Complaint.

16. This Defendant denies that Plaintiffs are entitled to the relief sought in Paragraph 16 of the Complaint.

17. This Defendant denies that Plaintiffs are entitled to the relief sought in Paragraph 17 of the Complaint.

18. This Defendant denies that Plaintiffs are entitled to the relief sought in Paragraph 18 of the Complaint.

19. This Defendant denies that Plaintiffs are entitled to the relief sought in Paragraph 18 of the Complaint.

DEFENSES

(Each defense alleged below is a separate and distinct defense)

1st Defense

The facts alleged in the Complaint are insufficient to state a claim upon which relief can be granted.

2nd Defense

Plaintiffs do not have standing to maintain a class action.

3rd Defense

This is not a class action within the meaning of Rule 23.

4th Defense

Plaintiffs have failed to join persons needed for a just adjudication of this action and required to be joined by Rule 19, Federal Rules of Civil Procedure. The joinder of those persons presently classified by this Defendant as over-the-road drivers is needed because they are so situated that the disposition of the action in their absence may impair or impede their ability to protect their seniority and other interests with this Defendant.

5th Defense

This court is without subject matter jurisdiction because the Complaint contains allegations which were not related to the facts alleged in the charge filed with the EEOC.

6th Defense

Plaintiffs have failed to satisfy the jurisdictional prerequisites for commencing an action under 42 USC Section 2000(e)-5(f) because they failed to file a charge with the Equal Employment Opportunity Commission within 90 days of the alleged discriminatory occurrence.

7th Defense

The Complaint fails to state a cause of action under 42 USC Section 1981.

8th Defense

This Defendant has in no way violated the Civil Rights Act of 1964 or such Civil Rights Act as amended and has not violated any civil rights act.

9th Defense

This Defendant has in no way violated 42 USC Section 1981.

10th Defense

The Court lacks subject matter jurisdiction under 42 USC Section 1981 insofar as the Complaint alleges discrimination on the basis of national origin.

11th Defense

This Defendant has in no way discriminated against Plaintiffs or any of Plaintiffs because of their race or national origin or in any other way.

12th Defense

In the contracts between this Defendant and the Unions, this Defendant and the Unions agree not to discriminate against any individual because of such individual's race, color, religion, sex or national origin and that employees shall not be limited, segregated or classified in any way to deprive an individual employee of employment opportunities because of race, color, religion, sex or national origin. If the discrimination alleged by the Plaintiffs had occurred, it would have furnished the basis for a grievance under the grievance and arbitration provisions of such Union contracts. No grievance has been filed by the Plaintiffs or any of them or by any Union on the ground that he or they have been discriminated against because of race; therefore, Plaintiffs have not exhausted their remedies provided for in said contracts and this court should defer to such grievance and arbitration provisions and dismiss this action.

13th Defense

Plaintiffs Sadrach G. Perez and Local Union 657, acting for him, duly presented a grievance in connection with his discharge by this Defendant and such grievance was carried to arbitration under the terms of the Union contract, and carried to a final and binding resolution under the terms of said contract. The joint Board set up under the

contract to arbitrate such matters, after hearing such grievance, denied same; thus, in effect, holding that said Plaintiff had been discharged for proper cause by this Defendant. Having invoked such contractual remedy, Plaintiff Sadrach G. Perez is bound by such decision and award and such decision and award is res judicata as to the said Plaintiff and as to the alleged rights and remedies sought to be asserted herein.

14th Defense

If there had been any discrimination because of race as alleged in Plaintiffs' Complaint, which this Defendant denies, such discrimination would constitute an unfair labor practice and the National Labor Relations Board has sole, exclusive and pre-emptive jurisdiction thereof and this court lacks jurisdiction of this case. The superior and pre-emptive right of the National Labor Relations Board to decide the issues sought to be raised by Plaintiffs herein are hereby pleaded and asserted.

15th Defense

Plaintiff Sadrach G. Perez did in fact file a charge with the Regional Director of the National Labor Relations Board against the International Brotherhood of Teamsters alleging a violation in failing to properly represent him in connection with the grievance and arbitration in connection with his discharge. Said charge is No. 23-CB-1205. The Regional Director, after carefully investigating and considering such charge advised such Plaintiff that there was insufficient evidence of such violation and that no complaint would issue. Thereafter, said Plaintiff appealed from such decision of the Regional Director to the General Counsel of the National Labor Relations Board who denied said Plaintiff's appeal. Said Plaintiff, therefore, is estopped from proceeding in the instant action by virtue of his election to utilize the remedies afforded by the National Labor Relations Act.

16th Defense

This Defendant avers that the purported remedy sought in the Complaint is in direct conflict with and in violation of Section 703(j) of Title VII of the Civil Rights Act of 1964, 42 USC 2000(e)-2(j) in effect at the date of any alleged violation thereof and as amended.

17th Defense

In the alternative, this Defendant alleges that Plaintiffs' claims, if any, are barred by Section 706(g) of the 1972 Act, the bar, as well as all of the remedies and protection afforded thereby, are hereby expressly pleaded.

18th Defense

In the alternative, this Defendant pleads the Texas two-year Statute of Limitations (Article 5526, Texas Revised Civil Statutes), the bar of which is hereby invoked and asserted.

19th Defense

Again in the alternative, this Defendant alleges the bar of any other applicable statute of limitations or similar provision barring stale claims.

20th Defense

Further in the alternative, this Defendant avers that Plaintiffs' claims and the monetary damages prayed for are barred and precluded by laches, the doctrine of laches being especially invoked as a bar.

21st Defense

Plaintiffs and each of them had an opportunity to and did in fact vote in favor of the acceptance of the collective bargaining agreements of which they now complain. By such affirmative action and conduct, Plaintiffs and each

of them have ratified the collective bargaining agreements, such ratification amounting to an accord and satisfaction as to the claims now sought to be asserted. Having accepted the benefits and fruits of such contracts, Plaintiffs are now estopped and precluded from questioning the provisions thereof.

22nd Defense

Plaintiffs and each of them do not have, and have not possessed, the reasonable requirements and qualifications established by this Defendant for over-the-road drivers.

23rd Defense

The seniority provisions and classifications in the collective bargaining agreements to which this Defendant is and has been a party, are based upon reasonable business necessity and, therefore, do not constitute a violation of the Civil Rights Act.

WHEREFORE, this Defendant prays that Plaintiffs take nothing and that it go hence with its costs without day.

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Attorneys for Defendant
East Texas Motor Freight

(Certificate of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

(Caption Omitted in Printing)

CIVIL ACTION No. SA-71-CA-302

Motion To Reopen Case for Receipt of Further Evidence

The Defendant, Local Union 657, moves the Court to reopen this case, which was tried before the Court and which the Court presently has under advisement, for the purpose of receiving further evidence.

This Motion is made under the authority of Rule 59, Federal Rules of Civil Procedure, and the cases which have construed such rule as authorizing the Court to grant this Motion.

The evidence which Defendant Local Union 657 requests be admitted into the record is the attached affidavit of R. C. Shafer and George Hardeman, Jr. (Exh. A), and extracts from the minutes of a meeting (Exh. B). These intruments relate to action that was taken at a special Union Membership Meeting on February 11, 1973, after the trial of this case was completed. In this meeting, the employees of the defendant freight line, and others, voted down a proposal that the next city and road driver contracts be merged, and both job classifications be permitted to transfer to the other with company seniority. The majority of the employees attending this meeting were Mexican-Americans and Negroes who work as City Pick-Up and Delivery Drivers.

The facts set out in the attached affidavit are highly material to the main defense of Defendant Local Union 657 in this case. They are offered for the purpose of showing that the majority of the Mexican-American and Negro

members of this Defendant oppose one contract for city and road drivers with area-wide seniority and the right to transfer between job classifications and terminals. These facts are also offered to further show that this Defendant has acted in the only manner possible under all applicable law pertaining to its duties as a collective bargaining representative.

Respectfully submitted,

BRADFORD F. MILLER
EDWARD W. PENSHORN
519 Majestic Building
San Antonio, Texas 78205
Attorneys for Defendant
Local Union 657

/s/ By: Edward W. Penshorn
Of Counsel

(Certificate of Service Omitted in Printing)

AFFIDAVIT

STATE OF TEXAS)
COUNTY OF BEXAR)

BEFORE ME, the undersigned authority, personally appeared R. C. Shafer and George Hardeman, Jr., who after being by me duly sworn, upon their oaths depose and state as follows:

I, R. C. Shafer, am the President and Business Manager of Teamsters Local Union 657, located at 5626 Monterey Street, San Antonio, Texas. I am, by national origin, part Indian and part Anglo.

I, George Hardeman, Jr., am the Recording Secretary of Teamsters Local Union 657, 5626 Monterey Street, San Antonio, Texas. I am, by national origin, a Negro.

We were both present at a special called meeting on February 11, 1973 of all employees, represented by Teamsters Local Union 657, who work for common carrier truck lines under the current National Master Freight Agreement and its Southern Conference, Road, City, Clerical and Garage Supplemental Agreements. This meeting was held at the Union Hall at 5626 Monterey Street, San Antonio, Texas. It started at 11:15 A.M. and ended at 2:15 P.M.

No one was permitted to be present at this meeting and participate in it except employees of freight lines who work under the above mentioned collective bargaining agreements. A record was made of the employees who attended by having those present sign a roster. This roster shows that the racial and national origin of those in attendance was broken down as follows:

Mexican-Americans	*Negroes*	*Anglos*
83	13	42

Of the total 138 people in attendance, 121 of them were city pick-up and delivery drivers who work under the

National Master Freight Agreement and its Southern Conference Pickup and Delivery Agreement known as the city contract.

On June 30, 1973, the current collective bargaining agreements involved in this case between the truck lines and the Teamsters Union will expire. The By-Laws of this Union state that whenever a collective bargaining agreement is about to be negotiated that a meeting will be called of the members so that they can determine and authorize the bargaining demands to be made of the employer. The purpose of this meeting was for the affected employees to advise Local Union 657 what wages, hours and working conditions they want the Union to try to negotiate for them in their next collective bargaining agreement with their employers.

The purpose of the meeting was explained to the members present by R. C. Shafer immediately after it was called to order. A Motion was then made, seconded and passed without a dissenting vote that Local Union 657 give a power of attorney to the negotiating committee of the International Brotherhood of Teamsters authorizing it to negotiate the new collective bargaining agreements with the freight line employers.

Thomas Salinas, who is a city driver for Roadway Express, Inc. in San Antonio, Texas and who was a witness for the plaintiffs in this Court in the case of Jesse Rodriguez, et al, v. East Texas Motor Freight, et al, Civil Action No. SA-71-CA-302, made a proposal that the city driver and road driver contracts be merged into one contract with system-wide seniority throughout the Southern Conference of Teamsters, and that city drivers be allowed to transfer to the road and road drivers allowed to transfer to the city.

After discussion on the above proposal was completed, a standing vote of those for and against it was taken so

that an accurate count could be made. Mr. Thomas Salinas, Mr. Jesse Uriquizo and Mr. D. C. Fuller counted the votes. The result was 21 for the proposal and 87 against it. If all possible Anglo votes were deducted from the total against it, the proposal would still have been rejected by a majority of just the Mexican-American and Negro votes.

A second proposal was made by Mr. J. B. Hicks to the effect that all employees, in all job classifications, be allowed ninety (90) days in which to indicate their desire to transfer to another job classification. This proposal included a request that when job openings become available the employer fill them by selecting from those employees who had indicated a desire to change jobs, on the basis of seniority. Those employees making a change would have thirty (30) days in which to qualify or voluntarily return to their old jobs with their old job seniority. After the thirty (30) day period, if an employee remained in the new job he would have his company seniority for all purposes, but would lose all seniority in his old job and all right to return to it. After considerable discussion, this proposal was defeated by a vote of 39 for the proposal to 72 against it.

A third proposal was made to the meeting by Mr. Tony Perez to the effect that the seniority of the employees working for the freight lines remain as it is in the current contracts. This proposal was approved by a vote of 69 for the proposal to 25 against it.

About two hours of the total meeting time was spent in discussion of the above three proposals by those present. The minutes of the meeting which deal with these proposals are attached to this affidavit.

Signed this ——— day of February, 1973.

R. C. Shafer
George Hardeman, Jr.

(Subscription Omitted in Printing)

TEAMSTERS LOCAL UNION 657
SAN ANTONIO, TEXAS 78237
MINUTES—SPECIAL MEETING
FREIGHT LINE EMPLOYEES
FEBRUARY 11, 1973

Thomas Salinas—Roadway Express—City: I propose that serious consideration be given to implementing Articles 37 and 38 in the contract on equal employment opportunities for minorities.

R. C. Shafer: I think you are going to have to state how you want this done so the committee can act on it.

Thomas Salinas: I do not know how to do it, but I want Articles 37 and 38 lived up to.

R. C. Shafer: This is not a specific proposal. Can you state what you want done.

Thomas Salinas: I want a man from the city to be able to go on the road and vice-versa.

R. C. Shafer: If there are no road driver jobs here this would have to be on a system-wide basis.

Thomas Salinas: We are denying people the right to go on the road.

R. C. Shafer: Will you state what it is you want in the contract.

Thomas Salinas: I want equal opportunity for better paying jobs. I don't know how to do it. The attorneys should be able to do it.

R. C. Shafer: I think you need system-wide seniority to do what you want.

Thomas Salinas: Then I want system-wide seniority.

R. C. Shafer: Do you want to merge all contracts into one?

Thomas Salinas: I had rather have it just on a state wide basis.

R. C. Shafer: Some companies do not have road drivers in the state.

Thomas Salinas: System wide seniority in the Southern Conference is what I want.

Joe Eaton: Is every man here prepared to move 5 or 6 times a year to another terminal? You would have to uproot your family every time.

R. C. Shafer: Joe, don't argue with Tom. Just talk to the members.

Ethel Stanzell—Braswell—Office: If there is an opening for a line driver it could be posted and the city driver could bid on it and take his seniority.

Modesto Herrera: At Southern-Pacific when a person was laid off, he had the option of staying here and working as casual, or bumping into another terminal.

J. B. Hicks, Lee Way Motor Freight—City: I think that anyone that wants to go on the road should be given 90 days to sign a list, and then have 30 days to qualify or decide if he wants to stay, and after that he would lose all his city seniority.

R. C. Shafer: J. B., this is a different proposal. Will you hold it until later after we have finished talking about Tom's?

Jesse Rodriguez: When you are laid off it is usually only for two or three months. You do not have to move.

Jesse Urquizo—Lee Way Motor Freight—City: I do not want to go on the road myself.

D. C. Fuller—East Texas Motor Freight—Office: I have been a road driver, a city driver and a clerk. I think we

should keep it on a local basis and keep our terminal seniority.

Ray Burrow—East Texas Motor Freight—Mechanic: I have been a mechanic for twenty-five years. Some companies have a rule that you must have 5 years experience to be a mechanic. I don't want to be told I am laid off here on Friday and have to try to bump into Memphis, Tennessee the next Monday morning.

Guadalupe Martinez: Do we have system wide seniority on the East and West Coasts?

R. C. Shafer: No. On the West Coast they have terminal seniority.

Frank Morales, Roadway Express—City: I think system-wide seniority would work.

Thomas Salinas: I notice we got some comments from the office and mechanics. They should be left out.

N. G. Albert: Can this be worked out on a company level?

R. C. Shafer: The freight lines negotiate as groups with the Union through a committee.

Is there any further discussion? If not, we will take a standing vote so we can be sure to get a correct count. Will Tom Salinas, D. C. Fuller and Jesse Urquizo count the votes and then compare their counts.

The proposal is that all contracts with the freight lines be merged into one contract with the right to transfer between jobs with system-wide seniority throughout the Southern Conference.

A standing vote was then taken with 87 voting against the proposal and 21 for it.

J. B. Hicks: I make a proposal that anyone that wants to go on the road to give him a trial basis of three months to see if he likes it.

R. C. Shafer: I don't understand your proposal.—Is this it—That a list be posted on the bulletin board by the companies and the people be given 90 days to sign showing that they want to transfer, and then they be given a probationary period to qualify.

J. B. Hicks: Yes, give them only 90 days to make up their minds. Then if they transfer they lose all their city seniority, but keep them company seniority.

Frank Washington—East Texas Motor Freight—City: Within the company we could file an application that if a road job came open then the company would hire from within the company with seniority. This would apply to all people—clerks, mechanics, everyone.

R. C. Shafer: Allright. J. B. has made a motion that the companies post a notice on the bulletin board for 90 days giving all employees a chance to sign showing they want to transfer to another job. Then when an opening occurs the company will fill the job from the list on the basis of seniority. Then the employee would have 30 days to qualify or return to his old job. If he stays on the new job he would have his company seniority for everything but would lose all his seniority in his old job. Is this right, J. B.?

Herbert Ott—Lee Way Motor Freight—Garage: This would apply only to present employees.

R. C. Shafer: The motion is that the list would only be up for 90 days. Is there anyone else that wants to talk on the Motion?

Modesto Herrera: I suggest one contract for just the city and the road drivers.

R. C. Shafer: The proposal includes everyone. It is to apply throughout the Southern Conference.

Frank Morales: Merchants put their jobs up for bid once a year.

Joe Eaton: What if road drivers transfer into San Antonio with a lot of seniority and then there is a layoff?

R. C. Shafer: Is there anyone else that wants to talk?

The chairman then restated the proposal to be voted on.

Ethel Stangell: What if a road driver bumps in here and I lose my job. I can't go out on the dock and handle freight.

Gene Katara—Lee Way Motor Freight—City: This cuts out casuals.

R. C. Shafer: Is there any further discussion? If not, we will take a vote.

A standing vote was then taken with the count being made the same way as the previous proposal.

The vote was 72 against the proposal and 39 for it.

Tony Perez—Roadway Express—City: I make a motion that we keep our present seniority as it is.

Frank Washington: I want the Company to post openings and give the Company people 30 days to apply and take their company seniority with them. Also, they should be given 30 days to come back to their old jobs.

Jesse Rodriguez: If we vote down all the proposals we don't solve the problem.

Thomas Salinas: There are a lot of lawyers in the Southern Conference. They should be able to figure this out.

Joe De Luna—Roadway Express—City: All proposals are being shot down.

Thomas Salinas: What if this proposal denies equal rights to Mexican-Americans?

R. C. Shafer: The big majority of the people here today are Mexican-Americans and Negroes. Everyone has a right to vote the way he wants to vote.

Is there any further discussion on the Motion to keep the seniority in all contracts the way it is now?

There being no further discussion a standing vote was again taken of those for and against the Motion.

The vote was 69 for the Motion and 25 against it.

Present at the meeting were 121 city drivers, 5 road drivers, 7 office employees and 5 garage employees.

I hereby certify that the above is a true and correct copy of that portion of the minutes dealing with proposals on a single contract, transfer between jobs and seniority made on February 11, 1973 at a special meeting of employees working for various motor freight lines called for the purpose of getting their requests for their new contract with their employers.

Signed this ——— day of February, 1973.

George Hardeman, Jr.
Recording Secretary
Teamsters Local Union 657

In the United States District Court
For the Western District of Texas
San Antonio Division

Civil Action No. SA-71-CA-302

Jesse Rodriguez, et al.
v.
East Texas Motor Freight, et al.

Findings of Facts and Conclusions of Law

On the 29 day of January, 1973, came on to be heard the above entitled and numbered cause for trial on the merits, and both parties appeared in person and by their Attorneys of Record and announced ready for trial, whereupon the Court proceeded to hear the evidence from the witnesses and oral arguments of counsel and at the conclusion of the trial and after consideration of all the pleadings, the evidence adduced by both parties, the arguments of counsel and applicable law, the Court hereby makes it Findings of Fact and Conclusions of Law.

Findings of Fact

1. This Court has jurisdiction of this action by virtue of Title 42, U.S.C., Section 2000e-5(f) and Title 28, U.S.C., Section 1343 (4) providing a cause of action under Title 42, U.S.C., Section 1981.

2. The plaintiffs are employees of the defendant truck line and members of the defendant Union and its affiliates (Local 657 of the Southern Conference of Teamsters and the International Conference of Teamsters), with the exception of the plaintiff, Jesse Rodriguez, who is no longer an employee of the defendant truck line. Plaintiffs are all Mexican-American residents of the United States and residents of San Antonio, Bexar County, Texas. The defendant truck line is a corporation doing business in the State of Texas and the City of San Antonio and operates and main-

tains a local city-wide freight terminal and a city-wide trucking service in San Antonio, Bexar County, Texas and is an employer within the meaning of Title 42, U.S.C., Section 2000 e-(b). The defendant Union and its affiliates are the representatives and bargaining agents of the plaintiff employees on an international, regional and local basis.

3. All plaintiffs were hired by the defendant truck line as regular city pick-up and delivery drivers on the dates set out herein and have remained in that capacity to the present time.

Jesse Rodriguez	-	Sept., 1965
Modesto Herrera	-	May, 1965
Sadrach Perez	-	May, 1959

4. It is stipulated that none of the plaintiff employees were discriminated against as to their original employment.

5. Except for one road driver employed by the Valley Copperstate Sunset Lines, who was transferred from San Antonio, Texas immediately after the merger in 1970 with East Texas Motor Freight, the defendant truck line has never had any road drivers domiciled in San Antonio, Bexar County, Texas and the San Antonio terminal is operated solely as a local, city-wide pick-up and delivery service.

6. It is stipulated that prior to and subsequent to the effective date of Title VII of the 1964 Civil Rights Act to the date that Jesse Rodriguez filed a charge of discrimination with the Equal Employment Opportunity Commission (E.E.O.C.) the defendant truck line had never employed a Negro or Mexican-American as a line driver in the State of Texas covered by the Southern Conference Area Supplemental Agreement.

7. It is stipulated that except for having been received and filed locally by the Terminal Manager Sager in August

1970, the defendant truck line has never considered the written applications for employment as road drivers of the plaintiffs. Such applications were transmitted to the Dallas corporate office of the defendant truck line subsequent to the filing of the E.E.O.C. charges involved herein.

8. It is stipulated that the claim of discrimination of the plaintiffs is solely based upon the fact that after their original employment they have been "locked in" to the lower paying job of city driver and have been denied a job as road driver because:

(a) of the maintenance of separate seniority rosters for city and road drivers;

(b) of the fact that any city driver, regardless of his race, if he transferred from city driver classification to a road driver classification, loses his accumulated city seniority;

(c) the defendant truck line discouraged inquiries from the plaintiffs concerning the qualifications and/or availability of road driver jobs;

(d) the defendant truck line had always employed Anglo/white applicants as road drivers; and

(e) the defendant truck line's policy and practice has been based to a great extent on a word of mouth system. Since the defendant truck line's road drivers and supervisory and terminal personnel are almost exclusively Anglo/white, such a practice has continued the alleged illegal exclusion of Mexican-Americans and Negroes as road drivers.

9. It is further stipulated that the only issue presently before the Court pertaining to the defendant truck line is whether or not its failure to consider the plaintiffs' road driver applications constituted a violation of Title VII and 42 U.S.C., Section 1981.

10. On April 1, 1970 the defendant truck line and the defendant Union entered into the National Master Freight Agreement and Southern Conference Area Local Freight Forwarding Pick-up and Delivery Supplemental Agreement (hereinafter referred to as "Union Contract") which expires June 30, 1973 and the terms and conditions of which are fully known and understood by the plaintiff employees. The plaintiff employees have ratified this contract and prior similar contracts since the time of their employment, with the exception of Jesse Rodriguez who voted against ratification of the current contract solely because of the strike and lock-out by the Chicago bargaining unit in the Spring of 1970 and not due to any contract clause made the subject of this suit.

1. The provisions of the Union Contract providing for job transfer from a city driver to a road driver and vice versa, including the provision for separate seniority lists for city and line drivers, apply to all job applicants and employees regardless of race or qualifications, and are not in any way discriminatory.

12. The defendant truck line's policy and regulations regarding job transfers are generally:

(a) The applicant must relinquish his current position;

(b) The applicant must make written application for a new position at terminal location where the job is sought;

(c) The applicant must be willing to re-locate at the new terminal location;

(d) For a road driver job, applicants must pass certain standardized Department of Transportation tests and company tests (driving and physical); and

(e) The applicants must have certain road driving experience.

These regulations are not unreasonable and apply to all job applicants and employees regardless of race or qualifications. It is stipulated that the standards and qualifications of the defendant truck line for its road drivers are not discriminatory. The fact that each terminal is autonomous as concerns the employment of drivers is proper and in accordance with accepted business practices.

13. The plaintiff employees testified that they were unwilling or at least ambivalent to comply with the job transfer requirements even when confronted with a hypothetical opportunity to make the job change under the existing regulations "tomorrow" assuming a position was available. Thus, plaintiffs' objections are not grounded on lack of job availability, but rather on the stringency of the regulations.

14. There has been no showing of discrimination as regards the hiring practices of the San Antonio Terminal office of the defendant truck line.

15. The plaintiff employees have never filed a discrimination grievance charging a violation under Article 38 of the Union Contract, but originally filed a Complaint with the Equal Employment Opportunity Commission.

16. The plaintiff employees have never availed themselves of participating in the contract amendment negotiation meetings at the local Union level in an effort to change the job transfer requirements.

17. The plaintiff employees have not been discriminated against by their Union. The Union is comprised of a majority of Mexican-Americans and Negroes and every member is free to participate in the contract negotiating process and to vote on every issue or contract presented to the membership.

18. When the plaintiff employees inquired from various supervisory personnel at the San Antonio Terminal as to the method of securing a road driving position, they were not discouraged nor misled, but rather the requirements were explained (i.e. they would have to make application at the road driving terminal location, etc.). The failure of the plaintiff employees to secure a road driving position was due to an unwillingness to give up their city driving seniority and inability to meet the job qualifications rather than actual racial discrimination by either the defendant truck line or the defendant Union.

19. In January, 1972, the company made the following modification in its no-transfer policy: during a period of 30 days at any terminal where line drivers were domiciled, a city driver could make application for transfer to a line driver's job. He would be given the necessary tests and if he qualified, as a road driver job opened up or became available, he would be permitted to take the job. In effect, the requirement of three years immediate prior line haul road experience was temporarily waived as to such city drivers.

In the area covered by the Southern Conference of Teamsters, there were 202 applications by city drivers. Some of them failed to qualify or to pass the required tests. Some qualified, but did not like over-the-road driving and voluntarily went back to city driving. In the end, only five city drivers successfully made the transition or transfer to over-the-road drivers' jobs. All five of these worked out of the Memphis, Tennessee terminal.

20. The plaintiff, Jesse Rodriguez, continues in his employment with the defendant truck line as a city driver. His driving and work record includes numerous accidents (at least three) and at least five injuries.

21. The plaintiff, Modesto Herrera, continues in his employment with the defendant truck line as a city driver.

His driving and work record includes at least three accidents, at least seven injuries, much time off because of injuries, and at least four warning letters, three of which involved abnormally low productivity.

22. The plaintiff, Sadrach G. Perez, was employed by the defendant truck line as a city driver until his discharge for cause on May 18, 1971. His driving and work record included the following:

(1) On January 18, 1966 he claimed to have been totally and permanently disabled in an accident in which he hurt his back stacking boxes. In June of 1966 he filed suit in the District Court of Bexar County, Texas, appealing from an award of the Industrial Accident Board and alleging that he was "totally and permanently incapacitated". On July 27, 1966 this suit was voluntarily dismissed. There was no settlement with or payment by ETMF's compensation carrier.

(2) On October 22, 1970 Sadrach G. Perez was given a warning letter by the then terminal manager for violating instructions and a long-standing policy of the terminal.

(3) On January 28, 1971 Perez was dispatched with a shipment to Lackland Air Force Base. The shipment included 471 pieces, totaling 5,133 lbs., with most of the pieces weighing around 11 lbs. and no piece weighing more than 25 lbs.

He complained to the Assistant Terminal Manager Ezra Beierle that the truck in which the merchandise was loaded did not have a lift gate and wanted to unload the merchandise onto a truck that did have a lift gate. Beierle refused, telling him to proceed with the delivery.

Perez then went to the office of Terminal Manager Asbury and demanded that the truck be

unloaded and the merchandise loaded onto one having a lift gate. The argument consumed about 20 minutes. Asbury told him to proceed with the delivery. Perez left with the statement, "I've been too good too long." He proceeded to Lackland where he took a total of five hours to deliver 5,133 lbs. at one location.

He was given a written reprimand and warning because of the incident.

(4) A few days later, he filed a Workmen's Compensation claim asserting that on the Lackland delivery on January 28, 1971 he injured his left shoulder and upper back and neck.

(5) On January 29, 1971 he was given a written warning notice because of partial absences from work on January 26, 27 and 28.

(6) On March 26, 1971 he was given a warning notice because of his failure to make a delivery on March 24, 1971 at Solo Serve, the warning notice citing other instances in February, 1971 of poor production by him.

(7) On March 26, 1971 he was given a warning notice in connection with a delivery at Sonney Plumbing and Air Conditioning Company. He had unloaded the merchandise on the ground. When the lady in charge, Mrs. Mary Fewell, asked him to please place it on the dock, he refused, claiming that the stacking of the merchandise on the ground completed the delivery. Mrs. Fewell wrote a letter to the company protesting the fact that Perez was disrespectful and discourteous to her.

(8) On May 18, 1971 Perez was dispatched with a load of drugs to the Scobey Warehouse. The

boxes had been segregated by numbers in the trailer at the point of origin (Chicago). The instructions to Perez were that he was to load them on pallets at the Scobey Warehouse according to the instructions.

Perez became involved in an argument with the Scobey supervisor about how the pallets were to be delivered to him. Assistant Manager Beierle made a trip to Scobey's to attempt to solve the problems which Perez had created.

Terminal Manager Asbury and Beierle made another trip to Scobey's attempting to solve the problems.

Finally, about 2:45 P.M., Asbury received a call from Chicago in which the shipper complained about the way its merchandise was being handled at Scobey's, Scobey's having apparently reported to the shipper. Perez was ordered to lock the trailer and return to the terminal, where he was discharged by Asbury.

(9) Local Union No. 657 filed a grievance in connection with the discharge which eventually reached arbitration and was heard by the Joint Committee at a meeting in Biloxi, Mississippi. After a full hearing, the committee decided in favor of the company and against Perez (and the Union). At the hearing, evidence was introduced that more than ten (10) customers of the company had given instructions not to send Sadrach Perez back to their places of business, stating that they would refuse the freight if it was to be delivered and would not give up freight if he was to pick it up.

(10) On July 19, 1971 Perez filed a charge with the National Labor Relations Board against the In-

ternational Brotherhood of Teamsters alleging a violation of the act in its failure to properly represent him. The Regional Director declined to issue a complaint. Perez appealed to the General Counsel who denied the appeal. Represented by counsel, Perez has a current claim pending before the Industrial Accident Board arising out the 1971 alleged accident in which he claims that he is totally and permanently disabled, claiming to have a bad back.

23. None of the plaintiff employees could satisfy all of the qualifications for a road driver position according to the company manual due to age or weight or driving record. The qualifications apply universally to all job applicants and employees and are not in any manner racially discriminatory.

24. The driving, work, and/or physical records of the plaintiffs are of such nature that only casual consideration need be given to determine that the plaintiffs cannot qualify to become road drivers. The failure of the defendant truck line to proceed with a detailed, comprehensive consideration of the plaintiffs' applications was for valid business reasons and not because of any discrimination against any of the plaintiffs because of their race or national origin.

25. Both the defendant truck line and the Union defendants are bound by the contracts in that neither can unilaterally change the contract provisions by allowing a merger of seniority lists, a transfer of seniority or in any other manner attempting to alter, combine or discard the provisions of the separate contracts for city and road drivers without subjecting themselves to economic or other negative sanctions by the non-offending party.

26. Refusal by the defendant truck line to permit job transfers without loss of terminal seniority or to maintain

separate seniority lists is a reasonable and proper business practice and in accordance with the Union Contract and in no manner causes, perpetuates or results in discriminatory practices by any of the defendants.

27. The fact that there are separate Union Contracts and job qualifications for city and road drivers is reasonable both as an accepted business practice and by the fact that the National Labor Relations Board recognizes the two job groups as separate bargaining units.

28. The defendant truck line did not prevent or discourage the plaintiff employees from seeking or securing a road job transfer nor from making written application for said position because of their race or because they filed a Complaint with the Equal Employment Opportunity Commission, or for any other reason.

29. The defendant truck line and Union did not discriminate against the plaintiff employees because they made a charge or indicated they would make a charge against the defendants to the Equal Employment Opportunity Commission.

30. The defendants did not discriminate against the plaintiffs or any other employee or Union member on the basis of race or otherwise.

31. Plaintiffs have at no time moved for a prompt determination of the question of whether or not this cause of action should be maintained as a class action and have offered no credible proof on the question.

32. Plaintiffs have offered no proof of liability or damages as to any class, having confined the evidence, arguments and post trial brief to the individual claims of the named plaintiffs, and having stipulated at the commencement of trial that the only issue before this Court with respect to the defendant truck line involved its failure to consider the individual plaintiffs' applications for employment as road drivers.

33. While not compelling, further evidence of a continuing desire of the majority of the local Union membership is contained in the affidavit of R. C. Shafer, President and Business Manager of the local Union, and George Hardeman, Jr., Recording Secretary of the local Union, filed February 23, 1973. The parties have stipulated that, if called, these two men would testify that at the Unon Membership meeting on February 11, 1973, after the trial of this case was completed, the employees of the defendant truck line, and others, rejected proposals that the next city and road driver contracts to be merged and that both job classifications be permitted to transfer to the other with company seniority for all purposes. A further proposal to the effect that the seniority of the employees working for the truck lines remain as it is in the current contracts was approved by a vote in excess of two to one.

CONCLUSIONS OF LAW

1. I conclude as a matter of law that none of the defendants violated Title 42, United States Code, Section 2000e-5 or any section of Title 42 relating to race discrimination.

2. I further conclude that this cause of action is not a proper one for class action and that, therefore, the class action claims in the Complaint should be, and the same are hereby, DISMISSED.

3. I further conclude as a matter of law that the plaintiffs, and each of them, take nothing by reason of their suit and that the defendants and each of them are entitled to judgment.

4. I further conclude that the defendants, and each of them, recover their court costs incurred herein against the plaintiffs.

ENTERED this 22nd day of March, 1973, at San Antonio, Texas.

/s/ JOHN H. WOOD, JR.
John H. Wood, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL ACTION No. SA-71-CA-302

(Caption Omitted in Printing)

Judgment

On the 29th day of January, 1973, this action came on for trial before the Court, the Honorable John H. Wood, Jr., United States District Judge presiding, and the issues having been duly tried and heard and the Court, having made Findings of Fact and Conclusions of Law, is of the opinion that Judgment should be entered for the defendants.

It is, therefore, ORDERED, ADJUDGED AND DECREED that the plaintiffs take nothing by reason of their suit, that the action be dismissed on the merits, and that the defendants, and each of them, recover their Court costs incurred herein against the plaintiffs.

ENTERED this the 22nd day of March, 1973, at San Antonio, Texas.

/s/ JOHN H. WOOD, JR.
John H. Wood, Jr.
United States District Judge

JESSE RODRIGUEZ, SADRACH G. PEREZ and MODESTO HERRERA, on their own behalf and on behalf of those similarly situated, *Plaintiff-Appellants*

v.

EAST TEXAS MOTOR FREIGHT, SOUTHERN CONFERENCE OF TEAMSTERS AND TEAMSTERS LOCAL 657, *Defendant-Appellees.*

Fifth Circuit.

Nov. 25, 1974.

Appeal from the United States District Court for the Western District of Texas

Before WISDOM, AINSWORTH and GODBOLD, *Circuit Judges.*

WISDOM, *Circuit Judge:*

In this employment discrimination case the plaintiffs-appellants attack two ubiquitous practices in the trucking industry: (1) the trucking companies' requirement that "city drivers" resign from their city driver jobs before applying for the more lucrative and soughtafter "road" or "line driver"* positions, and (2) the companies, rule preventing city drivers from carrying their seniority to road driver jobs. The plaintiffs, Mexican-American city drivers for East Texas Motor Freight (ETMF), brought this action below as a class action, contending that these facially neutral practices of ETMF and the defendant union orgganziations perpetuate the effects of past discriminatory hiring practices and thus violate Title VII of the Civil Rights Act of 1964[1] and 42 U.S.C. § 1981.[2] The District

* The terms "road driver" and "line driver" are used interchangeably throughout this opinion.

[1] (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual,

Court found that the cause of action was inappropriate for a class action, and that none of the defendants had violated Title VII or Section 1981. We reverse.

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or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

• • • • •

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

42 U.S.C. § 2000e-2.

[2] All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981.

I.

Facts

In the trucking industry, "road" or "line driver" is considered a separate job classification from "city, pick-up and delivery driver". Road drivers for ETMF drive 10-speed tractors with semi-trailers, carrying freight among the 52 ETMF terminals in 19 states. Road drivers work long hours, and often spend long periods of time away from home, but they have the prestige driving job in the trucking industry, and they generally bring home the highest pay. Freight brought to a terminal by a road driver is unloaded and reloaded onto other trucks, either onto another tractor-trailer, or onto a "bobtail", a truck with the body and engine mounted on the same chassis. A city driver then delivers the merchandise locally.

In conformance with the practice in the trucking industry generally, ETMF "domiciles" road drivers at only some of its terminals: those in cities that are relay points equidistant between major centers, and those in "head haul" cities, cities at the end of a line of service that generate a significant amount of freight to other points in the company's system. In Texas ETMF has six terminals that domicile road drivers, and fifteen terminals that do not.[3] ETMF has city drivers at all terminals.

The primary responsibility for hiring drivers, both city and road, in the ETMF system rests with the manager at the terminal where a vacancy occurs. The manager interviews applicants, reviews their qualifications, and makes recommendations to officials at the corporate headquarters

[3] Those terminals domiciling road drivers are: Dallas, El Paso, Longview, Pecos, San Angelo, and Texarkana. Only city drivers are domiciled at the following terminals: Abilene, Amarillo, Atlanta, Austin, Beaumont, Brownwood, Ft. Worth, Henderson, Houston, Lubbock, Lufkin, Marshall, Odessa, San Antonio, and Tyler.

in Dallas. Although the Dallas officials must approve each applicant for employment, the terminal manager makes the affirmative decision to hire. The unions have no responsibility for hiring.

ETMF's qualifications for road drivers are more stringent than for city drivers. City drivers must be at least 21 years old and have at least one year pick-up and delivery experience. Road drivers must be at least 27 years old and have three years "immediate prior line haul road experience". Both city and road drivers face a battery of other requirements involving driving, work, credit, and police records. They must be familiar with Department of Transportation regulations, have a high school education or the equivalent, and hold a valid commercial drivers license. Finally, both city and road drivers must pass physical, written, and driving examinations. Everett E. Cloer, ETMF's Vice President in charge of industrial relations testified to the importance of driving tests for road drivers: "Well, first of all [applicants] are given a 25-mile driving test within the city to see if they can handle the transmissions of this equipment, see what their driving reactions are, et cetera. If they pass that, then they are given an in-cab trip with the supervisor. The supervisor rides with them on a student [over-the-road] trip."[4] Counsel for the parties stipulated that the line driver requirements are nondiscriminatory.

[4] The importance of road testing as a criterion for hiring road drivers was echoed by Ed A. Asbury, Manager of ETMF's San Antonio terminal. When asked how he would determine whether city drivers were qualified to be road drivers, he answered: "I think I should have to ride with those boys to be able to answer that question. I don't know . . . I would have to—if I were going to make an honest appraisal, I would get out and ride with that man. I would ride with him here in town, and I would ride with him on the freeway. I would ride with him in line haul equipment. I would see what he would do, how he conducted himself, how he handled his equipment."

City drivers and road drivers are covered by different collective bargaining agreements. The defendant-appellee Local 657 has a collective bargaining agreement with ETMF covering city drivers at ETMF's San Antonio terminal. Local 657 represents no road drivers of ETMF. The defendant-appellee Southern Conference of Teamsters, a delegate body of the International Brotherhood of Teamsters, Chauffeurs and Warehousemen and Helpers of America, is made up of representatives from the affiliated Locals in ten southern states. Separate collective bargaining agreements for city and road drivers are drawn by the Southern Conference and negotiated by the Conference with trucking company representatives. Then the agreements are passed down to the Locals to be approved and made part of the contracts between the Locals and the trucking companies.

Since 1954 ETMF has followed a "no-transfer" policy, prohibiting the transfer of drivers between city and road driver classifications and between terminals.[5] Under the policy, in order for a city driver to obtain a position as a road driver, he must resign his city driver job and apply for a road driver slot. He thereby forfeits all accumulated seniority. In effect, he stands on no better footing in applying for a road driver job than a complete stranger to the company. For the purposes of strengthening his application, he gains no "credit" for his years as a city driver. And if his bid to be a line driver fails, there is no guarantee that he will be rehired as a city driver. ETMF's policy against transfers is complemented by the fact that under collective bargaining contracts between ETMF and Local unions, including the defendant Local 657, city drivers who transfer to the road do not carry over their "competitive-status" seniority, that is, seniority for job bidding and lay

[5] Road drivers for ETMF presently operate under a "modified" terminal no-transfer policy. If a road driver at one terminal is laid off, he can "bump" a less-senior road driver at another terminal.

off purposes.[6] Under separate collective bargaining agreements for road and city drivers, competitive-status seniority runs from the time an employee enters a particular collective bargaining unit. Transfer is not expressly prohibited, but it is not expressly permitted either, and the agreements have been universally interpreted to prohibit the carryover of seniority from one classification to another.

For thirty days in January and February 1972, to ease morale problems among its city drivers who wanted to become road drivers, ETMF relaxed its no-transfer policy and permitted city drivers to transfer to line jobs, if they could qualify.[7] During this period, although all other requirements were maintained, the requirements of three years line driving experience was waived. The modification did not affect the dual seniority system, established by the separate collective bargaining agreements. Any city driver transferring to the road under the modified policy still lost his seniority for job bidding and lay off purposes. Moreover, the one-time-only change in policy opened the possibility of transfer only to those city drivers who worked out of terminals domiciling road drivers; the restrictions on interterminal transfers remained in effect. In the Southern Conference area 220 city drivers showed an interest in transferring under the temporary policy, and 35 to 50 city drivers tried out; five succeeded in transferring to road driver jobs.[8]

Against the history of these policies must be juxtaposed one crucial set of facts. The parties stipulated that before 1970 East Texas Motor Freignt had never employed a black or Mexican-American as a road driver in the Texas-South-

[6] The employee keeps his company seniority for fringe benefit purposes.

[7] Road drivers were also permitted to transfer to the city.

[8] All five of the city drivers to make successful transition to road driver jobs worked out of the Memphis, Tennessee, terminal.

ern Conference area.[9] ETMF's road driver force in that area numbered approximately 180, all white/anglo drivers. After charges were filed by plaintiff Jesse Rodriguez with the Equal Employment Opportunity Commission (EEOC) on August 20, 1970, the company hired three Mexican-American road drivers in El Paso. By the time of trial, the company had still not hired a single black road driver in Texas. In comparison, approximately 35 percent of ETMF's city drivers in Texas are black or Mexican-American. Of a total of 575 city drivers for ETMF in the state, 111 are Spanish-surnamed, 95 are black, and 369 are anglo.

The three named plaintiffs, Jesse Rodriguez, Sadrach Perez, and Modesto Herrera, are Mexican-American city drivers at ETMF's San Antonio terminal. With the exception of one road driver who temporarily worked out of San Antonio in 1970, ETMF road drivers have never been domiciled in San Antonio. San Antonio city drivers were therefore not able to take advantage of the temporary modification of the no-transfer rule in the winter of 1972. Perez was hired as a city driver in 1959, Herrera was hired in 1964, and Rodriguez was hired in 1965. They stipulated that they were employed at the San Antonio Terminal without regard to race, color, or national origin. Each is a member of Local 657 and the Southern Conference.

Although none of the named plaintiffs made written application for a line driver job until 1970, Herrera made verbal inquiries about transferring to the road as early as 1965. In 1970 the plaintiffs submitted letters to the San Antonio terminal manager, requesting transfer to road driving jobs. The terminal manager received and filed the letters. ETMF stipulated that it never considered these applications for employment as road drivers. On August 20, 1970, Rodriguez filed a written charge with the EEOC

[9] The Southern Conference covers all Teamster members in Texas, except for some in El Paso.

complaining that the policies of ETMF, Local 657, and the Southern Conference relegated Mexican-Americans and blacks to city driver jobs. Similar charges were filed by Herrera on March 11, 1971, and by Perez on June 7, 1971. On May 18, 1971, Perez was discharged from his employment with ETMF. The plaintiffs received thirty-day "right-to-sue" letters on October 11 and 13, 1971. On October 26, 1971, the plaintiffs filed this class action suit in district court.

Prior to the trial in this cause, the parties entered into a series of stipulations. In addition to the stipulations already mentioned, the parties agreed to the following:

The claim of discrimination of the Plaintiffs is solely based upon the fact that after their original employment, they have been "locked in" to the lower paying job of city driver and denied a job as line driver because of:

(a) The maintenance of separate seniority rosters for city and line drivers;

(b) The fact that any city driver regardless of his race, if he transferred from city driver classification to a road driver classification, loses his accumulated city seniority;

(c) The Defendant East Texas Motor Freight discouraged inquiries from Plaintiffs concerning the qualifications and/or availability of line driving jobs;

(d) The fact that the Defendant East Texas Motor Freight had always employed Anglo/white applicants as road drivers;

(e) That the company's policy and practice of recruiting line or road drivers has been based to a great extent on a word of mouth system. Since the company's line drivers and supervisory terminal personnel are almost exclusively Anglo/white, such a practice has

continued the alleged illegal exclusion of Mexican-Americans and Negroes as road drivers;

That the only issue presently before the Court pertaining to the company is whether the failure of the Defendant East Texas Motor Freight to consider Plaintiffs' line driver applications constituted a violation of Title VII and 42 U.S.C. § 1981.

Over strenuous objection at trial, the district court admitted evidence relating to the qualifications of the named plaintiffs to be road drivers. After trial, the court concluded that none of the named plaintiffs could satisfy all of the road driver requirements "according to the company manual due to age or weight or driving record". Furthermore, the court found, "[t]he driving, work, and/or physical records of the plaintiffs are of such nature that only casual consideration need be given to determine that the plaintiffs cannot qualify to become road drivers". In conclusion, the court found that "[t]he defendants did not discriminate against the plaintiffs or any other employee or union member on the basis of race or otherwise". The plaintiffs appealed. The Equal Employment Opportunity Commission, as amicus curiae, has filed a brief urging reversal of the decision of the district court.

II.

The Class Acting Action Claim

The plaintiffs brought this suit "on their own behalf and on behalf of other Mexican-American and black individuals who similarly have been denied equal employment opportunities by the defendants and additionally on behalf of Mexican-American and black individuals who may, in the future, be denied equal employment opportunities by the defendants because of their national origin and race". They described the class more particularly as "all of defendant

East Texas Motor Freight's Mexican-American and black in-city drivers included in the collective bargaining agreement entered into between East Texas Motor Freight and the Southern Conference of Teamsters covering the State of Texas . . . [and as] all Mexican-American and black applicants for line driver positions with East Texas Motor Freight included in the above area covered by the Southern Conference of Teamsters from July 2, 1965, to the present". Neither the plaintiffs nor the defendants moved for a ruling under FedR.Civ.P. 23(c)(1) as to whether the suit could be maintained as a class action, and the court made no ruling until after the trial was completed. In its findings the court stated:

> 31. Plaintiffs have at no time moved for a prompt determination of the question of whether or not this cause of action should be maintained as a class action and have offered no credible proof on the question.
>
> 32. Plaintiffs have offered no proof of liability or damages as to any class, having confined the evidence, arguments and post trial brief to the individual claims of the named plaintiffs, and having stipulated at the commencement of trial that the only issue before this Court with respect to the defendant truck line involved its failure to consider the individual plaintiffs' application for employment as road drivers.

Concluding that the cause of action was "not a proper one for class action", the court dismissed the class action claims. In our opinion, the district court's dismissal of the class action was erroneous.

Rule 23(c)(1) provides that "[a]s soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained". A class action may not be dismissed because the class representatives fail to ask for a ruling on

the propriety of the class nature of the suit. That responsibility falls to the court. "The court has an independent obligation to decide whether an action brought on a class basis is to be maintained even if neither of the parties moves for a ruling under subsection (c)(1)". Wright & Miller, Federal Practice and Procedure, Civil § 1785 (1972).

The plaintiff class representatives, of course, must establish that the action meets the requirements of Rule 23(a).[10] See Rossin v. Southern Union Gas Co., 10 Cir. 1973, 472 F.2d 707, 712; Johnson v. Georgia Highway Express, Inc., 5 Cir. 1969, 417 F.2d 1122, 1125 (Godbold, Jr., concurring); 3B J. Moore, Federal Practice ¶ 23.02-2 (2d ed. 1974); Wright & Miller, Civil § 1759 at 578. But the requirements of Rule 23(a) must be read liberally in the context of suits brought under Title VII and Section 1981. See Wright & Miller, Civil § 1771. Suits brought under these provisions are inherently class suits. By definition, discrimination on the basis of race or national origin is a class wrong. Oatis v. Crown Zellerback Corp., 5 Cir. 1968, 398 F.2d 496, 499. And a suit charging employment discrimination is naturally "a sort of class action for fellow employees similarly situated". Jenkins v. United Gas Corp., 5 Cir. 1968, 400 F.2d 28, 33; see Parham v. Southwestern Telephone Co., 8 Cir. 1970, 433 F.2d 421, 428; cf. Newman v. Piggie Park Enterprises, 1968, 390 U.S. 400, 401-402, 88 S.Ct. 964, 19 L.Ed.2d 1263. When class relief is sought in the complaint, therefore, the court should liberally apply

[10] (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
Fed.R.Civ.P. 23.

the requirements of Rule 23(a). See Bing v. Roadway Express, Inc., 5 Cir. 1973, 485 F.2d 441, 446; compare Danner v. Phillips Petroleum Co., 5 Cir. 1971, 447 F.2d 159, 164 (class relief not sought in complaint).[11]

There is no serious dispute that the plaintiffs here satisfied the first three criteria in Rule 23(a). The class clearly meets the requirements that the members be so numerous that joinder would be impractical, that there are common questions of law and fact, and that the claims and defenses of the representative parties are typical. The defendants argue strenuously, however, that there was insufficient guarantee that the named parties would "fairly and adequately protect the interests of the class".

The defendants maintain that the named plaintiffs have acted antagonistically to the interests of a majority of Mexican-American and black city drivers. The complaint requests that the court order the city and line driver seniority lists be merged to create a single seniority system based solely on the date that an employee first joined the company. The desirability of such relief, argue the defendants, was expressly rejected at a membership meeting of the defendant Local 657 on February 11, 1973, approximately two weeks after the completion of the trial. An affidavit recounting the results of voting at the meeting was admitted into evidence under Fed.R.Civ.P. 59. At the meeting the union members voted 87 to 21 against a proposal that the city and road driver contracts be merged and that city drivers be permitted to transfer to the road while road drivers were permitted to transfer to the city. Of the 138 people present at the meeting, 121 were city pick-up and delivery drivers. Eighty-three were Mexican-Ameri-

[11] In *Danner* this Court expressly limited its holding: "All we hold is that class action relief must be predicated upon a proper class action complaint satisfying all the requirements of Rule 23". 447 F.2d at 164 n. 10.

can, 42 were Anglo, and 13 were Negro. If all possible Anglo votes were deducted from the total against it, the proposal still would have been rejected by a majority of Mexican-American and Negro votes.

We do not ascribe the significance to the vote that the defendants urge. We cannot tell what assumptions were made implicit. Furthermore, the membership of Local 657, even the Mexican-American and black membership, is far from congruent with the class described in the complaint. The Local's membership is both more restricted and more extensive. The Local draws its membership from the San Antonio area; the complaint covers city drivers throughout Texas. The Local has members who work for trucking firms other than ETMF; the class outlined in the complaint is restricted to employees or applicants of ETMF. The extent to which the vote represents the actual preference of the class, therefore, is unclear.

Even taking the results of the vote at face value,[12] we reject the district court's conclusion that there was sufficient reason to dismiss the class action in this case. Especially in light of the fact that the evidence of the union vote was not received until two weeks after the trial, there were two preferable options open to the trial judge. First,

[12] The outcome of the vote is consistent with what one might expect of a vote of ETMF's San Antonio city drivers. Separate seniority rosters in separate contracts prevent laid-off road drivers from bumping less senior city drivers from their jobs. Because ETMF does not domicile road drivers in San Antonio, to take advantage of a merger of seniority rosters and obtain a road job, a San Antonio city driver with ETMF would have to move to another city. Those city drivers who would not desire such a move, or who would not desire to transfer to the road for some other reason, would not gain from a merger of seniority rosters. We note that in a similar case a court has recently refused to order a merger of seniority rosters because to do so would injure those members of the plaintiff class who did not wish to transfer to road driving jobs. Sabala v. Western Gillette, Inc., S.D.Ky.1973, 362 F.Supp. 1142, 1153.

he could have shaped the class to remove any possible antagonism between the representatives and some of the city drivers. The court could have narrowed the class or separated it into subclasses for purposes of relief. See Oatis v. Crown Zellerbach Corp., 398 F.2d at 499. Or, the court could have shaped the relief to avoid any injustice to the dissenting class members. District courts have wide discretion in fashioning relief under Title VII, Franks v. Bowman Transportation Co., 5 Cir. 1974, 495 F.2d 398, 414; Bing v. Roadway Express, Inc., 485 F.2d at 448-449. And flexibility and careful tailoring of judicial decrees in Title VII cases are the order of the day. See, e. g., Sabbala v. Western Gillette, Inc., S.D.Tex.1973, 362 F.Supp. 1142. The disagreement here concerned only the proper remedy; there was no antagonism with regard to the contention that the defendants practiced discrimination against the plaintiff class. We do not believe that disagreement within the class as to the remedy desired, surfacing so late in the litigation, should have resulted in a dismissal of the class action.

Because the trial was completed before the court made a ruling whether the class action could be maintained, there were involved none of the imponderables that make the decision so difficult early in litigation, and that demand a substantial amount of district court discretion and corresponding appellate deference. See Johnson v. Georgia Highway Express, Inc., 417 F.2d at 1123. We have before us a record of the proceedings, completed as a class action, and we can judge for ourselves the possible effects of any antagonism of interests. We find these effects insubstantial and curable. We conclude that the plaintiffs met the requirements of Rule 23(a) and established a proper class action under Fed.R.Civ.P. 23(b)(2).[13]

[13] (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

• • • • •

(2) the party opposing the class has acted or refused to act

The district court's finding that the plaintiffs offered no proof on the question of liability or damages to any class is clearly erroneous. As we describe more fully below, the plaintiffs entered into evidence statistics sufficient to present a prima facie case of past hiring discrimination, transmitted into the present by the no-transfer rule and separate seniority rosters which "lock" employees into city driver positions and prevent their transfer to road driver status. The plaintiffs further submitted, without objection, detailed information pertaining to all ETMF city drivers including their names, seniority dates, and domiciles. It is true, as the district court noted, that the plaintiffs concentrated at trial on the individual claims of the named plaintiffs. But the plaintiffs were not required to present more than a prima facie case of discrimination against the class. Nor did the plaintiffs effectively abandon their class claims by stipulating that "the only issue presently before the Court pertaining to the company is whether the failure of the Defendant East Texas Motor Freight to consider Plaintiffs' line driver applications constituted a violation of Title VII and 42 U.S.C. § 1981". The stipulation was apparently entered in an attempt to eliminate some confusion in the exposition of evidence at trial, not to foreclose the class issues. The plaintiffs continued to proceed as in a class action. And this was made clear to the trial court and the defendants.[14]

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on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole;

Fed.R.Civ.P. 23.

[14] The following colloquy took place between the trial judge and Mr. Heidelberg, counsel for the plaintiffs:

THE COURT:

I assume, this being a matter before the court, that Mr. Heidelberg probably has in mind using this witness to establish a general practice and to show that this man was similarly

To the extent that the district court's finding that the plaintiffs failed "to offer proof of liability or damages as to any class" refers to the class of "all Mexican-American and black applicants for line driver positions with East Texas Motor Freight", the finding is not erroneous. The plaintiffs never pursued the action on behalf of these individuals, and the district court's dismissal of the class action on their behalf was proper. On remand, the class considered for relief should be defined as all of East Texas Motor Freight's Mexican-American and black city drivers included in the collective bargaining agreement entered into between East Texas Motor Freight and the Southern Conference of Teamsters covering the State of Texas.

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treated although he may have no personal complaint. It would merely corroborate the testimony that such a practice exists. For that limited purpose—

MR. HEIDELBERG:

For that purpose and also, Your Honor, it has not been established that this is not a class action. The allegation is made in the complaint and there have been no motions filed. The answers of the defendants deny that this is a class action, but of course we maintain that there is class action involved.

THE COURT:

Well, are you contending now as far as this trial is concerned that this is a class action?

MR. HEIDELBERG:

Yes, Your Honor.

THE COURT:

And how many people are you going to try to establish this by?

MR. HEIDELBERG:

As outlined in the complaint, Your Honor, the class would consist of the Mexican-American and black city drivers who are located in the State of Texas covered by the jurisdiction of the Southern Conference Supplemental Agreement.

III.

Liability

In the last few years we have seen a large number of suits brought in federal court, attacking facially neutral policies which allegedly discriminate against minority city drivers by perpetuating patterns of discrimination in the hiring of line drivers by private firms in the trucking industry.[15] As the federal courts have thus become familiar with the practices in the trucking industry, a clear pattern has emerged: throughout much of the industry, trucking companies, and the unions representing drivers, have erected barriers to the movement of non-white/non-Anglo workers from pick-up and delivery jobs to the coveted road driver positions. The employment practices attacked in this suit—the no-transfer and seniority policies—are prevalent in the trucking industry. Typically, city drivers are not permitted to transfer to line driver jobs. Where they are, they are not generally permitted to carry over their seniority for job bidding and lay off purposes. The result is, at the very least, a strong disincentive for city drivers to transfer to the road. City drivers are thus effectively "locked in" their city driving jobs with no realistic possibility of transferring to line driving positions. Were there no more to the scenario, of course, the federal courts would likely have no concern; there is nothing per se illegal in no-transfer or separate seniority policies. But, as the courts have noted with some frequency, the policies often operate to perpetuate the effects of hiring discrimination. The overall result is a situation where in many areas of the country blacks and Mexican-Americans serve as city drivers, while road-driver fleets in private trucking firms, at least until very recently, have been

[15] See, e. g., the cases cited in note 17 *infra*.

virtually all-white/Anglo.[16] Thus it is that facially neutral no-transfer and seniority policies have come under a broad attack, for "[i]t is now beyond cavil that Title VII of the Civil Rights Act of 1964 proscribes employment practices and procedures which, although presently neutral and nondiscriminatory on their face, tend to preserve or continue the effects of past discriminatory practices". United States v. N. L. Industries, Inc., 8 Cir. 1973, 479 F.2d 354, 360. See Griggs v. Duke Power Co., 1971, 401 U.S. 424, 430, 91 S.Ct. 849, 28 L.Ed.2d 158; Pettway v. American Cast Iron Pipe Co., 5 Cir. 1974, 494 F.2d 211, 236; Local 189, United Papermakers & Paperworkers v. United States, 5 Cir. 1969, 416 F.2d 980, 990-991, cert. denied, 397 U.S. 919, 90 S.Ct. 926, 25 L. Ed.2d 100.

A. *Discrimination by East Texas Motor Freight*

We begin by examining the past hiring patterns of ETMF. See United States v. Jacksonville Terminal Co., 5 Cir. 1971, 451 F.2d 418, 450, cert. denied, 406 U.S. 906, 92 S.Ct. 1607, 31 L. Ed.2d 815. Although the plaintiffs do not attack ETMF's road-driver hiring practices—and indeed stipulated that they are not now discriminatory—we must begin there. A pattern of past discriminatory hiring is essential to the plaintiffs' case. See Jones v. Lee Way Motor Freight, Inc., 10 Cir. 1970, 431 F.2d 245, 247, cert. denied, 401 U.S. 954, 91 S.Ct. 972, 28 L.Ed.2d 237.

[16] Two recent studies have confirmed that Negroes and Mexican-Americans have been excluded from line driving jobs. One study found that, nationally, Negroes comprised only 2.4 percent of the over-the-road drivers for private trucking firms in 1968. Firms that employed more than 100 persons had only one-percent Negro road drivers. Leone, The Underutilization of Negroes as Truck Drivers By For-Hire Motor Carriers, 22 Lab.L.J. 631, 633 (1971). Another Study, covering 329 trucking companies for the year 1970, found that Negroes comprised 2.7 percent of the companies' road drivers. In these same companies, Spanish-surnamed Americans made up only .8 percent of the road drivers. See Nelson, Equal Opportunity in Trucking: An Industry at the Crossroads (GPO 1971).

A prima facie case of discrimination may be established by statistical evidence, and statistical evidence alone. "The inference [of discrimination] arises from the statistics themselves and no other evidence is required to support the inference." United States v. Hayes International Corp., 5 Cir. 1972, 456 F.2d 112, 120. The statistics in the instant case are overpowering. East Texas Motor Freight has stipulated that prior to the date that Rodriguez filed a charge of discrimination with the EEOC in 1970, ETMF had never employed a Negro or Mexican-American as a line driver in that portion of the State of Texas covered by the Southern Conference Area Supplemental Agreement. By the date of trial, two and a half years later, ETMF had hired three Mexican-Americans to join its Texas road driver force of approximately 180 drivers. By trial ETMF had still not hired a Negro road driver in Texas.

These figures establish a prima facie case of past discrimination in hiring. In other trucking cases the statistics have shown a similar pattern. In Jones v. Lee Way Motor Freight, Inc., 10 Cir. 1970, 431 F.2d 245, 247, for example, the Court summarized: "[T]here were no Negro line drivers; most whites were line drivers; and all Negroes were city drivers." Similarly, in Bing v. Roadway Express, Inc., 5 Cir. 1971, 444 F.2d 687, 688, the Court noted: "All road drivers are, and always have been white; all Negro drivers are city drivers, though not all city drivers are Negro." The similarity between the employment situations in both *Bing* and *Jones* and that here is striking. In *Bing* and *Jones*, and in each of the cases cited in the margin, the court held that the statistics were sufficiently potent to constitute a prima facie case.[17]

[17] Thornton v. East Texas Motor Freight, 6 Cir. 1974, 497 F.2d 416 (At ETMF's Memphis terminal, all of the 105 road drivers were white. Of the 131 city drivers, 43 were black.); Witherspoon v. Mercury Freight Lines, Inc., 5 Cir. 1972, 457 F.2d 496 (No black had ever worked for Mercury Freight as a long haul driver.); Hairston v. McLean Trucking Co., M.D.N.C.1973, 62 F. R.D. 642 (Of 479 over-the-road drivers at Winston-Salem terminal, nine were black.); United States v. Navajo Freight Lines, Inc., C.D. Calif.1973, 6 FEP Cases 274 (No black or Spanish-surnamed road drivers until 1970.); Sabala v. Western Gillette, Inc., S.D.Tex. 1973, 362 F.Supp. 1142 (Of 29 road drivers in Houston, 28 were white/Anglo; one was Mexican-American. Of 65 drivers in Houston, 42 were either black or Mexican-American.); United States v. Lee Way Motor Freight, Inc., W.D.Okl.1973, 7 EPD ¶ 9066 (940 road drivers were white, 14 were black, and 12 were other than white or black.); Sagers v. Yellow Freight System, Inc., N.D.Ga.1972, 6 EPD ¶ 885 (In 1968 of 150 road drivers for Yellow Freight in the Southern Conference area, none were black. As of May 12, 1972, only 3.6 percent of Yellow Freight's road drivers in the Southern Conference Area were black).

Once the plaintiffs established a prime facie case, the burden fell to the defendants to rebut the statistics or to explain the disparity in hiring.[18] See Rowe v. General Motors Corp., 5 Cir. 1972, 457 F.2d 348, 358. Having stipulated to the statistics, the defendants cannot, of course, dispute them. But the defendants do imply that the force of the statistical disparity is countered by the plaintiffs' stipulations that ETMF's qualifications for road drivers are not discriminatory and that the plaintiffs were employed at the San Antonio terminal without regard to race or national origin. The defendants also argue that the plaintiffs have not shown that any members of the plaintiff class were qualified as road drivers. We reject these contentions.

First, only historical hiring practices are at issue here. Whatever the nature of present hiring practices,[19] they

[18] Although the union defendants are not responsible for ETMF's hiring policies, the case against the unions, like that against ETMF, begins with the showing of past hiring discrimination that originally operated to foreclose the road driver jobs to blacks and Mexican-Americans. See p. 60, *infra*. The unions thus join ETMF in its effort to rebut the prima facie case of hiring discrimination.

[19] We do not accord the plaintiff's stipulation concerning present hiring practices the broad reading that the defendants do. See pp. 57-58, *infra*.

neither explain nor justify, without more, the past failure to hire minority line drivers. Without some proof presented by the defendants to the contrary, we must assume that the "lily white"/Anglo nature of the ETMF road driver fleet until 1970 resulted from discriminatory hiring practices.

Second, we accord no weight to the stipulation that the named plaintiffs were not discriminated against when they were hired at the San Antonio terminal as *city* drivers. It was their inability to gain a *road* driver job with ETMF at any terminal in Texas that the plaintiffs decry.

Finally, the defendants rely on language from McDonnell Douglas Corp. v. Green, 1973, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668, in which the Court said:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prime facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Nothing in this language is inconsistent with the accepted practice of federal courts' recognizing statistics as establishing a prima facie case of employment discrimination. Sagers v. Yellow Freight System, N.D.Ga.1973, 5 EPD ¶ 8885 at 5759. In *McDonnell Douglas* a black worker, laid off in a reduction-in-force, complained that he was not rehired because of his race and involvement in the civil rights movement. The Court emphasized that the "critical issue . . . concerns the order and allocation of proof in a private, [*non-class-action*] challenging employment discrimination". 411 U.S. at 800, 93 S.Ct. at 1823. (emphasis supplied). Furthermore, the Court observed in a crucial footnote that the test outlined in the text of the opinion for a prime facie case "is not necessarily applicable in every respect to differing factual situations". 411 U.S. at 802, n. 13, 93 S.Ct. at 1824.

The present case differs in several significant respects from *McDonnell Douglas*. First, this is a class action. Equally important, the Supreme Court noted in *McDonnell Douglas* no history of past employment discrimination or any other factor that might have discouraged the respondent from applying for a job. Indeed, he had had a job with the company, and its refusal to rehire him after his layoff formed the gravamen of the complaint. In contrast, at the time of Rodriguez's complaint to the EEOC, ETMF had never hired a black or Mexican-American line driver in the Texas-Southern Conference area. Given these past hiring practices, "it is not unreasonable to assume that minority persons [would] . . . be reluctant to apply for employment, absent some positive assurance that if qualified, they [would] in fact be hired on a more than token basis". Carter v. Gallagher, 8 Cir. 1972, 452 F.2d 315, 331 (en banc). It would be unrealistic to require the plaintiffs to show that blacks and Mexican-Americans applied for road driver jobs they knew they could not obtain. See Bing v. Roadway Express, Inc., 485 F.2d at 451; Jones v. Lee Way Motor Freight, Inc., 431 F.2d at 247. We note also another distinction. In *McDonnell Douglas* the respondent's qualifications were undisputed. He had held the job, and apparently served satisfactorily, before he was laid off. In the instant case, in contrast, the possibility of meeting one of the most important criteria for hiring—the road test—has been denied to the class of city drivers. Deprived of the opportunity to take a driving test, the plaintiffs could not prove they were qualified to become road drivers.

Proof that the relevant labor pool lacks qualified minority persons may, of course, even in a class action, rebut a

prima facie case of hiring discrimination. Congress did not intend that Title VII force employers to hire unqualified applicants of *any* race or ethnic background. Griggs v. Duke Power Co., 410 U.S. at 430, 91 S.Ct. 849; Sagers v. Yellow Freight System, Inc., 5 EPD at 5758. But it was ETMF's burden to show that its history of hiring only white/Anglo line drivers resulted from a scarcity of available Negroes and Mexican-Americans qualified to serve in that position. United States v. Hayes International Corp., 456 F.2d at 120. ETMF has not met this burden.

The next steps in our analysis were clearly delineated by Judge Thornberry in *Bing:* "Once is has been established that an employer or union has discriminated in the past, then, the inquiry is twofold: (1) Does the present policy perpetuate the past discrimination? (2) Is the present policy justified by a showing of business necessity?" 444 F.2d at 690.

The conclusion is inescapable that both the no-transfer policy and the maintenance of dual seniority rosters, one for city drivers and one for line drivers, have perpetuated ETMF's past discriminatory hiring practices. Together, they have removed all realistic opportunity for transfer. Under the no-transfer policy a city driver wishing to transfer to road status must first resign his city driver position, with no assurance that he will be hired as a line driver, and no assurance that if he fails to be hired he will be rehired as a city driver. Even if the city driver were to become a road driver, because of the separate seniority rosters he would lose his accumulated competitive-status seniority. He would have the last choice of routes and would be the first laid off. And if laid off, he would have no "bumping" rights to recover his city driver job. "In any industry loss of seniority is a critical inhibition to transfer." 451 F.2d at 453. It is no surprise, then, that when the company temporarily relaxed in 1972 its no-transfer policy and its requirements that road drivers have three years line haul

experience only five ETMF city drivers in the entire Southern Conference area took, qualified for, and held the road driver job. For a city driver with a significant amount of seniority the choice must have been a difficult one indeed. The named plaintiffs testified that they were unwilling to give up their city driving seniority to transfer to road driving jobs they otherwise desired. In the strictest sense, city drivers were "locked" into city driving jobs. The discrimination that removed the possibility that a Mexican-American or Negro could obtain a line driver job when first applying to the company was thus continued and perpetuated by the no-transfer and seniority policies which prevented the city drivers from later transferring to road driver jobs.

We turn to the question whether ETMF has justified the no-transfer policy and seniority system by a showing of business necessity. The business necessity standard is strict.

> "[T]he 'business necessity' doctrine must mean more than that transfer and seniority policies serve legitimate management functions. Otherwise, all but the most blatantly discriminatory plans would be excused even if they perpetuated the effects of past discrimination. . . . Necessity connotes an irresistable demand. To be preserved, the seniority and transfer system must not only directly foster safety and efficiency of a plant, but also be essential to those goals. . . . If the legitimate ends of safety and efficiency can be served by a reasonably available alternative system with less discriminatory effects, then the present policies may not be continued.
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> . . . .

United States v. Bethlehem Steel Corp., 2 Cir. 1971, 446 F.2d 652, 662, cert. denied, 404 U.S. 959. "In other words, management convenience and business necessity are not synonymous." United States v. Jacksonville Terminal Co., 451 F.2d at 451.

The business necessity test essentially involves balancing the need for the challenged practice or policy against its discriminatory impact. The business purpose must be "sufficiently compelling to override any racial impact"; it must "effectively and efficiently" carry out its business purpose; and there must be no acceptable alternative practice. Pettway v. American Cast Iron Pipe Co., 494 F.2d at 246; Robinson v. Lorillard Corp., 4 Cir. 1971, 444 F.2d 791, 798, cert. denied, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655.

ETMF advances two justifications for its no-transfer policy. The company first contends that the no-transfer policy is necessary to protect employees, property, and the general public. ETMF conjures up visions of an unqualified driver "hurtling through space, if you will, at 60 miles an hour with a rig of gross vehicle weight of 72,000 [pounds]".[20] While we do not underestimate the potential dangers raised by unqualified drivers, these can be effectively diminished by carefully screening transferees.[21] See Thornton v. East Texas Motor Freight, 6 Cir. 1974, 497 F.2d 416; Bing v. Roadway Express, Inc., 444 F.2d at 691. The visions invoked by ETMF argue for continued strict qualifications for road drivers, but they are not sufficient justifications for the no-transfer policy. Second, ETMF argues that as a driver-salesman the city driver's contact with customers is an important element in customer relations. The implication is that if city drivers are permitted to transfer, ETMF might lose customers. We must reject this contention also. Loss of city drivers by transfer is no more harmful to the company's pick-up and delivery business than loss for any other reason. We agree with the

[20] Brief for Appellee East Texas Motor Freight 33, quoting testimony of H. L. Johnson, President of ETMF.

[21] ETMF has a continuous training program for road drivers, which includes on-the-job training. The training program was accelerated after the no-transfer system was temporarily modified in 1972.

district court in Sagers v. Yellow Freight System, Inc., 6 EPD at 5760:

> The city driver's unique functions and skills may justify treating it as a separate job classification from that of road driver; it does not constitute an overriding business justification for denying qualified city drivers the opportunity to transfer to the road driver position where the latter position was initially closed to them on the case of race.

ETMF portrays its seniority system as preferred by the majority of black and Mexican-American city drivers. The company relies on the vote taken at the membership meeting of Local 657 where a majority of the black and Mexican-Americans rejected a proposal to merge city and road seniority rosters. "It is obviously good personnel management", argues ETMF, to honor the preference of its Mexican-American and black employees. Furthermore, the company hints, if it had acted to merge the seniority lines, it might have been subject to legal action by those blacks and Mexican-Americans who desired dual lists, contending that the merger constituted a violation of Title VII. See Graham v. Missouri-Pacific Truck Lines, S.D.Tex.1973, [C.A 71-11-1229, Feb. 2, 1973]. Whatever the merits of this argument as it is couched by ETMF, when relief is viewed in terms other than a merger of seniority lines, such as a once-only transfer by city drivers to line jobs with seniority carryover, any force behind the contention evaporates. ETMF's explanations do not meet the question why those blacks and Mexican-Americans who have desired to transfer have not been permitted to do so and to carry over their competitive-status seniority. Nor is it explained how permitting those city drivers to carry over their seniority would hurt other city drivers or be objectionable to them.[22]

[22] ETMF might have argued that to permit city drivers to carry over their seniority to road driver jobs would have been in violation of its contract with the local unions representing the line drivers, not parties to this case. Certainly the company might have antici-

The company finally contends that the plaintiffs have nevertheless failed to establish liability, because they have not shown that any of the plaintiff class meets ETMF's road driver qualifications. The argument is in essence that if members of the plaintiff class of city drivers cannot qualify for road driver jobs, how can it be said that it is the no-transfer and seniority policies that lock them in city jobs? Rather, the argument continues, city drivers are locked in by their inability to qualify for the sought-after line driver jobs, and ETMF is under no obligation to permit city drivers to transfer to line driver jobs for which they are unqualified.

ETMF would have us reverse the burden of proof, placed firmly on the defendant by the plaintiffs' prima facie case of past hiring discrimination perpetuated by facially neutral practices and policies. We stated earlier that the burden rested on the defendants to show that the failure to hire minority persons as road drivers resulted from an absence of qualified minority drivers available. So too we think the burden must remain on the defendants to prove that the discrimination shown by the plaintiffs' prima facie case is not perpetuated by present policies in that no mi-

pated some difficulty from those quarters, for permitting carryover of seniority into road jobs would put transferees ahead of some road drivers in seniority. Neither the threat of union difficulty nor the possibility that giving transferees seniority on the road driver roster would violate ETMF's contract with the road driver locals, however, would have provided a sufficient justification for refusing to give transferees seniority. Labor unrest stemming from interference with the expectations of white was found not to amount to a business necessity in United States v. Bethlehem Steel Corp., 2 Cir. 1971, 446 F.2d 652, Robinson v. Lorillard Corp., 4 Cir. 1971, 444 F.2d 791, 798-799 and Local 189, United Papermakers and Paperworkers, 5 Cir. 1969, 416 F.2d 989. Furthermore, difficulties caused by the fact that city and road drivers were covered by different union contracts was rejected as a business necessity in Bing v. Roadway Express, Inc., 5 Cir. 1971, 444 F.2d 687, 691, and Jones v. Lee Way Motor Freight, Inc., 10 Cir. 1970, 431 F.2d 245, 250.

nority city drivers are now qualified to transfer to road driver jobs. To our knowledge no court has hinged a finding of liability in a trucking case on proof that the plaintiff class of city drivers contains those qualified to assume road driver responsibilities. That some of the class will be found qualified to transfer when the discriminatory restrictions are removed has been uniformly assumed. Winnowing the qualified from the unqualified has been left to the remedy stage; only those city drivers wishing to transfer who meet objective and nondiscriminatory standards of the company are, in the final analysis, entitled to relief.

We agree with this approach. It is not the failure to hire as a line driver every city driver who would like to transfer to the road that forms the gist of the complaint in cases like the one before us. It is the policies of the company which discourage and prevent transfer regardless of qualifications that are under attack. In sum, we are of the opinion that ETMF has the burden of proving that none of the plaintiff class was qualified to transfer to the road.[23] It was not the burden of members of the plaintiff class to establish their qualifications before a case of discrimination could be made.

We recognize that by a literal reading of ETMF's road driver requirements, none of the plaintiff class of city drivers could qualify for a road driver job. No present city driver has three years "*immediate* prior line haul experience". Nor, we assume, do many city drivers have three years experience on the road, gained at any time; the spate of trucking cases that have been marched through the federal courts give clear indication of the difficulty that blacks and Mexican-Americans have had nationwide obtaining road driver jobs with private trucking firms. We do not, however, accept the criteria ETMF employs in determin-

[23] Ezra Bierle, dock foreman at ETMF's San Antonio terminal, testified that from 1968 or 1969 the tractor-trailer equipment driven by city and road drivers has been essentially the same.

ing whom to hire as road drivers. ETMF's road driver requirements must be read against the business necessity test. That standard, always stringent, requires that we scrutinize requirements of experience when that experience has been discriminatorily denied.

Although requiring experience at a particular job is neutral and job-related on its face [see Developments in the Law-Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv.L.Rev. 1109, 1145 (1971)], it is discriminatory to require experience as a prerequisite to employment when the experience is unavailable to minority persons. Blumrosen, Seniority and Equal Opportunity: A Glimmer of Hope, 23 Rut.L.Rev. 268, 309 (1969). We have in this Circuit approved a lower court's striking down an experience requirement as a criterion of membership in a labor union when "negroes were prevented from gaining such experience due to the union's racial discrimination". Local 53, International Association of Heat & Frost Insulators & Asbestos Workers v. Vogler, 5 Cir, 1969, 407 F.2d 1047, 1054-1055; see also United States v. Sheet Metal Workers, Local 36, 8 Cir. 1969, 416 F.2d 123; Dobbins v. Local 212, International Brotherhood of Electrical Workers, S.D.Ohio 1968, 292 F.Supp. 413. More significantly, we held in United States v. Jacksonville Terminal Co., 451 F.2d at 453, that where blacks were prevented by racial discrimination from utilizing their skills in the railroad industry, experience as a job criterion could not properly be confined to *railroad* experience. We do not imply that all experience requirements that act to perpetuate discrimination are illegal; only that they are illegal unless justified as a business necessity. And, as we have said, ETMF has not proved that three years' immediate line-haul experience is a business necessity for transfer of its city drivers to line-haul duties.

The defendants place great reliance on the plaintiffs' stipulation that "[t]he standards and qualifications of East Texas Motor Freight for its road drivers are not discrim-

inatory". The defendants argue that, rather than conceding only that the criteria are facially neutral, the stipulation waived any argument that the road driving requirements have a disparate impact and discriminatory effect. We do not accord the stipulation such a prominent position in this suit. As we have noted, ETMF's criteria for road drivers automatically exclude all members of the plaintiff class, including the named plaintiffs. No city driver now employed can have three years *immediate* prior line haul experience. And none of the named plaintiffs, at least, has three years experience road driving gained at any time. By the defendants' reading of the stipulation, therefore, the plaintiffs have disqualified themselves from the very relief they seek most urgently—transfer to road driver jobs. We cannot accept the interpretation that the plaintiffs, represented by counsel conceded by the defendants to be experienced Title VII attorneys, stipulated away their right to relief on the eve of trial.

In conclusion, the plaintiffs established an unrebutted prima facie case against ETMF of past hiring discrimination. It is manifest that the harmful effects of this past discrimination have been transported into the present through ETMF's facially neutral no-transfer and seniority policies. No compelling business necessity has been offered to justify ETMF's policies. In our view the district court's finding that ETMF did not discriminate against the named plaintiffs, or by implication the plaintiff class, is clearly erroneous. ETMF must be held to have violated 42 U.S.C. § 2000e-2 [24] and 42 U.S.C. § 1981.[25]

B. *Discrimination by Local 657 and the Southern Conference*

The plaintiffs contend also that Local 657 and the Southern Conference of Teamsters have acted to perpetuate the

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[24] See note 1 *supra*.
[25] See note 2 *supra*.

discrimination against the plaintiff class of city drivers by creating collective bargaining agreements that establish separate seniority rosters for road and city drivers without provision for seniority carryover for minority city drivers who desire to transfer to road jobs. Before examining the substance of this contention, we pause to outline in more detail the manner in which the collective bargaining agreement between ETMF and Local 657 came into being.

Although the collective bargaining agreement is a contract between ETMF and Local 657, it is the product of negotiation on a national and regional scale. First, there is the National Master Freight Agreement, negotiated on a nationwide basis between the Trucking Employers, Inc. and the National Over-the-Road and City Cartage policy and Negotiating Committee of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. The National Negotiating Committee represents the local unions; the locals give powers of attorney to permit the National Negotiating Committee to act on their behalf. Although the Master Agreement must be ratified by the locals, ratification is generally a formality. Once the agreement is accepted by a majority of the local unions, it goes into effect and binds all locals.[28] The Master Agreement covers both city and road drivers. Then there are the Supplemental Agreements. Like the Master Agreement, although Supplemental Agreements are signed and administered by each local union at each terminal, "they are negotiated on an areawide basis by Local representatives of em-

[28] International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Constitution, art. XVI, § 4 (1966). "While there is a separate formal contract between each local union and [the defendant company] in effect, the National Master Freight Agreement is published in pamphlet form and accepted nationwide, with a blank in which the number of each individual local union is inserted." Sagers v. Yellow Freight System, Inc., N.D.Ga.1972, 58 F.R.D. 54, 57.

ployees of all unionized trucking companies in that area". United States v. Pilot Freight Carriers, Inc., M.D.N.C. 1972,54 F.R.D. 519, 521. In our case the Supplemental Agreements were negotiated by the Southern Conference of Teamsters. From these negotiations came, so far as we are now concerned, two separate agreements, one covering road drivers and one covering city drivers. The agreements provide for seniority to run from the date of entry into a particular collective bargaining unit. At the terminal level, these separate agreements are administered by union locals. In the case before us, the city drivers for ETMF in San Antonio are represented by Local 657. Local 657 is an integrated union. Since 1952 a majority of the employees working for ETMF within the jurisdiction and membership of Local 657 have been blacks and Mexican-Americans.

As we mentioned earlier, it is the creation and maintenance of separate seniority rosters for road and city drivers without provision for seniority carryover by minority city drivers that forms the crux of the complaint against the union defendants. We agree with the plaintiffs that the discrimination against the black and Mexican-American city drivers that closed out the possibility of their being hired originally as road drivers was continued and reinforced by union action and inaction. For their role in continuing the effect of this discrimination the union defendants must share the blame and the liability.

We recognize that the prima facie case against ETMF for discrimination in the hiring of road drivers falls only indirectly against the union defendants. The company has always exercised full responsibility for hiring; the unions have never exercised any. We have discussed how the inability of city drivers to carry over their competitive-status seniority formed an important link in the chain that "locked" minority drivers into city driver jobs. Of this the unions were not unaware. Local 657 concedes in its brief that the "most important thing to an employee working

under a collective bargaining agreement, except perhaps for wage rates, is his seniority".[27]

The plaintiffs' prima facie case of hiring discrimination, and proof that the seniority system, a creature of the collective bargaining agreement, transmitted the discrimination into the present, shifted the burden to the defendant unions to show that the present discriminatory effects were unavoidable, that is, required as a business necessity.

The primary justification offered by the union defendants is that in contributing to the establishment of separate seniority rosters they were merely following the desires of the majority of their black and Mexican-American members. Once again the defendants rely on the post-trial defeat by members of Local 657 of a proposal to merge city and road driver contracts as an indication of the preferences of a majority of Mexican-American and black city drivers. As we mentioned earlier, the degree to which the vote should be taken to represent the true desires of members of the plaintiff class is uncertain. In any event, the unions perceive their responsibility too narrowly. There are established ways to eliminate the lock-in effect of separate seniority rosters without merging rosters and jeopardizing the seniority rights of those city drivers who remain in their positions. Most obviously, seniority carryover can be allowed on a one-time-only basis for qualified minority city drivers who wish to transfer to the road. See, e. g., Thornton v. East Texas Motor Freight, supra; Bing v. Roadway Express, Inc., 485 F.2d 441; United States v. Central Motor Lines, Inc., W.D.N.C.1971, 338 F.Supp. 532. No reciprocal arrangement for road drivers would have been necessary, because they have suffered no discrimination. See United States v. Chesapeake & Ohio Ry. Co., 4 Cir. 1972, 471 F.2d 582, 593. We believe a one-time-only transfer with seniority carryover was an alternative that could have

[27] Brief for Appellee Teamsters Local Union 657, at 16.

eased the discriminatory effects of the separate seniority lists without injury to any minority city driver. This reasonable alternative vitiates the business necessity defense. See United States v. St. Louis-San Francisco Railway Co., 464 F.2d 301 at 308; Robinson v. Lorrillard Corp., 444 F.2d at 798.

For their role in establishing separate seniority rosters that failed to make allowance for minority city drivers who had been discriminatorily relegated to city driver jobs, Local 657 and the Southern Conference must be held accountable. They have violated 42 U.S.C. § 2000e-2 and 42 U.S.C. § 1981. The district court's finding to the countrary is clearly erroneous.

IV.

Remedy

Because the district court concluded that the defendants were not liable under Title VII or 42 U.S.C. § 1981, it never reached the question of remedy. We remand for the court's consideration of this issue. The district courts have broad remedial powers to eliminate the present effects of past discrimination, and a large measure of discretion in modeling a decree. Local 53, International Heat & Frost Insulators & Asbestos Workers v. Vogler, 407 F.2d at 1052. The discretion is not unbridled, however, and we provide the boundaries within which the decree in this case must be drawn.

A. *Transfer*

We have long subscribed in this circuit to the theory that those who suffer discrimination under Title VII must be permitted to take their "rightful place" when job openings develop. As we said in Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d at 988:

> The Act should be construed to prohibit the *future* awarding of vacant jobs on the basis on a seniority

> system that "locks in" prior racial classification. White incumbent workers should not be bumped out of their *present* positions by Negroes with greater plant seniority; plant seniority should be asserted only with respect to new job openings. This solution accords with the purpose and history of the legislation.

See Note, Title VII, Seniority Discrimination, and the Incumbent Negro, 80 Harv.L.Rev. 1260 (1967). Thus, black and Mexican-American city drivers, many of whom would now be road drivers but for the discrimination of the defendants, must be given an opportunity to transfer to the road as road driving job openings develop.

ETMF need not permit unqualified plaintiffs to transfer to the road, but in determining who is qualified ETMF must use criteria that either have no disparate impact along the lines of race or national origin, or that can be justified as a business necessity. We have already stated that the requirement of three years prior road haul experience must give way. Because road driving experience has been denied to blacks and Mexican-Americans as a class, and because ETMF has not justified the experience requirement as essential, it may not be confined to road driving when to do so would discriminate against members of the plaintiff class. ETMF having failed to prove that three years' line-haul experience is a business necessity for transfer, each city driver must be considered to meet the experience requirement by showing three years of city driving on equipment similar to that used over the road.

The plaintiffs argue that, because not all trucking companies require three years experience, we should also reduce the number of years experience required. See, e. g., Bing v. Roadway Express, Inc., 485 F.2d 441 (1 year); Sayers v. Yellow Freight System, Inc., N.D.Ga.1973, 6 EPD § 8885 (2 years). Once the requirement of *road* expe-

rience requirement is removed, however, the experience requirement is not only *facially neutral*, it is *neutral in effect*. Thus it need not be justified as a business necessity. Congress did not intend that Title VII lead to uniform hiring practices across an industry. So long as hiring policies do not discriminate, Title VII does not require their modification.

We hold, not that all minority city drivers with three years experience at city driving must be permitted to transfer, but only that they may not be excluded unless they fail to meet other qualifications that either have no disparate impact along racial or national-origin lines or that can be justified as essential for safety or efficiency. On remand the district court should monitor carefully the criteria used by ETMF to prevent minority city drivers from transferring to line driving jobs.[28]

To permit minority city drivers the opportunity to return to their "rightful place" in the road driver ranks, the plaintiff class should be divided into sub-classes, one for each terminal in the Texas-Southern Conference area where ETMF domiciles road drivers. ETMF's system of terminal-based responsibility for hiring and of domiciling road drivers only at certain terminals is not discriminatory, and we leave these practices intact. Still, we are not blind to the recognized mobility of today's minorities. See, e. g., Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 at 1371. We may not assume that blacks and Mexican-Americans who became city drivers at a terminal where road drivers were not domiciled would not have moved to

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[28] While the in-cab road test is undoubtedly a legitimate method for determining the qualifications of a driver, it may be subject to abuse unless the chances of a subjective judgment by the tester are minimized. See, e. g., United States v. Central Motor Lines, Inc., W.D.N.C.1971, 338 F.Supp 532, 563. Moreover, a potential transferee who performs inadequately on this test should not be disqualified unless he cannot be expected to improve sufficiently given normal training.

a terminal where road drivers were domiciled had a road driver job been open to them. Therefore, those members of the class who now work in terminals where road drivers are not domiciled must be permitted to join the sub-class of their choice. In other words, they must be provided an opportunity to become road drivers at one of the terminals where ETMF domiciles road drivers. Black and Mexican-American city drivers at terminals where road drivers are domiciled should be placed in the sub-class corresponding to that terminal. We may assume that they are already at the terminal they would have chosen had road driver jobs been open to them in the past.

Within each sub-class, minority city drivers should be permitted the opportunity to transfer as jobs become vacant at that terminal. The minority city drivers should be ranged in the various sub-classes according to their "qualification dates", described below. The ranking should determine the order in which opportunities to transfer are awarded.

Over objection at trial, the district court admitted evidence pertaining to the qualifications of the named plaintiffs to become road drivers. The court then found that Rodriguez, Perez, and Herrera were unqualified. In light of the fact that the company admitted by stipulation that it did not consider any of the plaintiffs for employment as road drivers, we believe that the district court's action was premature. The question with regard to the named plaintiffs was not whether they were qualified, but whether ETMF's failure to consider their application was discriminatory. On remand, the district court should require ETMF to consider the plaintiffs for road driver positions as vacancies occur. The court should supervise carefully the standards used by ETMF to determine whether the plaintiffs are in fact qualified, and should view with particular skepticism and reliance by ETMF on disciplinary actions taken by the company after the plaintiffs initiated their actions with the EEOC.

B. *Seniority Carryover*

Members of the plaintiff class who transfer to the road must be permitted to take with them seniority for job bidding and lay off purposes. The question is "how much?" In general terms, the answer is that "how much seniority the transferee deserves should be determined by the date he would have transferred but for his employer's discrimination". Bing v. Roadway Express, Inc., 485 F.2d at 450. There is no way to arrive at such a date with exactitude, however, and some method for approximation is necessary.

In *Bing* we approved a "qualification date" formulation —the date a transferee had the experience necessary to qualify him for a road driving job. 485 F.2d at 451.[29] The *Bing* test represents a compromise between the trial court's determination in that case that seniority rights should date from when the transferees applied to become road drivers, and the remedy requested by the Government as amicus, that transferees should carry over full company seniority. This Court felt, on the one hand, that the application-date formulation of the district court failed "to account for the realities of entrenched employment discrimination", 485 F.

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[29] In this case the qualification date of a member of the plaintiff class of city drivers is the date when, in the employ of ETMF, the individual first accumulated three years combined road and city driving experience gained either with ETMF or with other organizations. If the individual already possessed such experience when hired by ETMF, of course, his qualification date will be the same as his company seniority date.

Similar to *Bing*, the straight qualification-date calculation must be modified to take account of that period from October 1969 to March 1971, during which ETMF did not hire any road drivers. The seniority of any member of the plaintiff class whose qualification date falls within the period when ETMF did no hiring must date from March 1970, when ETMF resumed hiring.

2d at 451; the company defendant's discriminatory practices discouraged city drivers from applying. On the other hand, the Government's theory of full seniority carryover would have given superseniority to those transferees who were not qualified to be road drivers before they began working for the defendant. Until they were qualified, "discrimination could not have blocked their employment as road drivers". *Id.*

The *Bing* qualification-date formulation was rejected recently by a divided panel of the Sixth Circuit. In Thornton v. East Texas Motor Freight, 6 Cir. 1974, 497 F.2d 416, a case involving the same trucking company that is a defendant in the instant case, the Court affirmed the district court's grant of seniority carryover dating from six months after the transferee requested transfer or filed a charge with the EEOC. Although the Court distinguished *Bing* on the grounds that more charges were filed with the EEOC in *Thornton* (thus apparently showing that "silence and futility of protest" were less the norm), the Court also criticized the *Bing* rationale: "The rationale in *Bing* was that silence might be caused by a belief in the futility of a transfer request. That may be true, but also it may be caused by no desire to transfer." 497 F.2d at 421. The Court also noted that "there is something to be said for rewarding those drivers who protest and help to bring rights to a group of employees who have been victims of discrimination". 497 F.2d 420.

We are unpersuaded by these considerations. First, we think that the best indication whether a person desired transfer to the road in the past is reflected in whether he desires transfer now, so long as we do not create special incentives or disincentives that skew the balance. The qualification-date test of *Bing*, by taking into account experience requirements on the one hand and the effects of entrenched discrimination on the other, is as neutral as any we can envision. Second, the concern showed by the *Thornton* major-

ity for rewarding those who help to bring rights to a group of employees was adequately answered by Judge Phillips, dissenting in part: "Any such 'reward' should not be at the expense of the other victims of the discrimination. Title VII was enacted to protect *all* employees from unlawful discrimination. This is especially true where the discrimination intimidated the employees to such an extent that they felt it would be futile to request a transfer." 497 F.2d at 428. In short, we reaffirm the qualification-date formulation of Bing.[30]

C. *Back Pay*

The district court should consider the question of back pay, with particular reference to the guidelines laid down in Pettway v. American Cast Iron Pipe Co., 494 F.2d at 251-263; Johnson v. Goodyear Tire & Rubber Co., 491 F.2d at 1375-1380; and Bing v. Roadway Express, Inc., 485 F.2d at 452-455. In these cases the criteria for the award of back pay, and the method of calculation, have been thoroughly analyzed. The most difficult question remaining before the district court will be the apportionment of the burden of paying any back pay awards among the three defendants. Consistent with the broad discretion awarded the district

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[30] This Circuit recently required that transferees in a trucking case similar to this one be permitted use of "full company seniority" in their new positions. Franks v. Bowman Transportation Co., 5 Cir. 1974, 495 F.2d 398, 416. The Court emphasized, however, a critical difference between that case and *Bing*: "In [*Bing*], Roadway had a flat requirement of one year's experience for road drivers, so that the qualification date was easily calculable. To allow the use of company seniority before that date would have placed the discriminatee in a better position than he could have achieved without the discrimination. In this case, by contrast, Bowman had no rigid one-year experience requirement. It sometimes accepted OTR [over-the-road] trainees with little or no prior driving experience." *Id.* 495 F.2d at 417 n. 17. As in *Bing*, the qualification date in the instant case is easily calculable. The three-years experience requirement has been rigidly adhered to.

court on this question in Johnson v. Goodyear Tire & Rubber Co., 491 F.2d at 1382, we intimate no view to this question.

V.

The Consent Decree

On June 29, 1972, the United States filed a "pattern and practice" [31] suit in the Northern District of Texas against ETMF, the Teamsters International, and the International Association of Machinists and Aerospace workers, challenging nationwide essentially the same practices at issue in the instant private class action. February 19, 1974, approximately one month before we heard oral argument in the case before us, the parties to the Government's suit entered into a consent decree. The decree covered:

> A. Such black or Spanish-surnamed city drivers, hostlers, checkers and garage employees who are domiciled at a terminal where road drivers are presently domiciled or where road drivers have been, since July 2, 1965, domiciled under either ETMF or a predecessor company.
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> B. Such persons who are incumbent city employees employed at a non-road driving terminal who have, since July 2, 1965, indicated a desire to transfer to the road.[32]

In addition to setting some standards for hiring and establishing hiring ratios, the decree established "transfer procedures". City drivers were to be afforded 30 days "to indicate an interest in transferring to the road driver classification at the terminal in which he is employed (if that terminal has an over-the-road operation) or at a terminal within

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[31] See 42 U.S.C. § 2000e-6.

[32] The decree also covered some named individuals.

the job market, or to a terminal of his choice (if the terminal at which he is employed has no over-the-road operation) . . . ." The issue of seniority rights was left for later resolution. The decree provided also that ETMF was to furnish a total of $175,000 as back pay compensation for members of the affected class nationwide. Persons accepting a portion of this settlement were to sign a release "stating that such designated portion is accepted in full and final settlement of all claims for monetary compensation, back pay or any other type of relief against ETMF or any predecessor corporation based upon any pending litigation or other alleged discriminatory actions because of race or national origin occurring prior to the date such release is signed".

A judgment by consent binds the parties and those in privity with them. Seaboard Air Line Railroad Co. v. George F. McCourt Trucking, Inc., 5 Cir. 1960, 277 F.2d 593. Members of the plaintiff class in the present action were not parties to the Government's suit, nor do they have interests in privity with the Government. See Williamson v. Bethlehem Steel Corp., 2 Cir. 1972, 468 F.2d 1201, 1203, cert. denied, 411 U.S. 931, 93 S.St. 1893, 36 L.Ed. 390; *cf.* Trbovich v. United Mine Workers of America, 1972, 404 U.S. 528, 92 S.Ct. 630, 30 L.Ed.2d 686.

We hold, therefore, that the consent decree does not operate as collateral estoppel to prohibit any members of the plaintiff class from participating in relief in this case. See also IB J. Moore, Federal Practice ¶ 0.411 [1] (2d ed. 1974). Those members of the plaintiff class who accept compensation under the consent decree and sign a release, of course, are bound by the terms of the release. But no other members of the plaintiff class lose any right to relief in the instant case.

We have chosen not to accord the consent decree any great weight in our outline of the relief to be awarded by the district court. First, the "affected class" awarded relief

in the consent decree does not encompass an important segment of the plaintiffs' class here—black and Mexican-American city drivers at "non-road driving" terminals in the Texas-Southern Conference area who have not "indicated a desire to transfer to the road." The Government's remedy is thus based implicitly on the theory, one we reject, that the acceptance by a black or Mexican-American of a job as a city driver at a city-only terminal, at a time when no road positions were open to him, signifies a lack of interest in a road driver position. Rather, we have taken cognizance of both the mobility of the modern work force and the reality of entrenched employment discrimination that makes a request to transfer a futile gesture. Second, private plaintiffs in class actions under Title VII and the United States in "pattern and practice" suits protect different interests: the Government protects general economic interests in addition to the rights of minorities; private plaintiffs represent only the interests of minority group members. United States v. Local No. 3, Operating Engineers, N.D.Calif.1972, 4 FEP Cases 1088, 1093. While the Government may be willing to compromise in order to gain prompt, and perhaps nationwide, relief, private plaintiffs, more concerned with full compensation for class members, may be willing to hold out for full restitution. Finally, we cannot ignore the possibility that, if we permit negotiated settlements by the Government to control the relief accorded in pending private actions against the same plaintiffs, private actions will be significantly discouraged. Such a result would have a deleterious effect on enforcement of Title VII and would not, in our opinion, be consistent with the intent of Congress.

We are not unmindful of the argument that by going beyond the relief awarded by the consent decree we may discourage defendants in "pattern and practice" suits from entering into settlements with the United States when a Title VII private class action is proceeding simultaneously against the same defendant. The court in *Local No. 3, Operating Engineers* expressed a similar concern: "If the United States cannot offer a final settlement in cases where a pattern and practice suit is proceeding simultaneously with a class action, then the Government's bargaining power will be severely reduced". 4 FEP Cases at 1093. Our worries are eased, however, as were those of the court in *Local No. 3, Operating Engineers,* by the Government's support of the broad class relief outlined in the opinion. As amicus curiae in this case, the EEOC has filed a post-argument brief arguing that "those who elect not to take under the consent decree, as well as those who are not covered by the decree, should have an opportunity to pursue vindication of their rights through this private litigation."[33]

The case is reversed and remanded for proceedings consistent with this opinion.

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[33] Supplemental Brief for the United States Equal Employment Opportunity Commission as Amicus Curiae 4.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK
August 18, 1975
TO ALL COUNSEL OF RECORD
No. 73-2801—Jesse Rodriguez et al. vs. East Texas Motor Freight, et al

Dear Counsel:

This is to advise that an order has this day been entered denying the petition(s)* for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH, *Clerk*
by /s/ CLASE F. SACHS
Deputy Clerk

cc: Mr. Jim Heidelberg
Ms. Debra Millenson
Mr. Theo F. Weiss
Messrs. Richard C. Hotvedt
Harry A. Rissetto
Messrs. George E. Seay
William Strock
Messrs. Edward W. Penshorn
Bradford F. Miller
Messrs. G. Wm. Baab
L.N.D. Wells, Jr.
Hall Gillespie

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* Filed by Local Union 657, Southern Conference of Teamsters and East Texas Motor Freight.

[5]

[Transcript of Proceedings Held before the United States District Court for the Western District of Texas, San Antonio Division, on January 29, 1973]

* * * * * * * * * *

MR. WEISS: I think all parties are ready. All parties are in court and represented by counsel and we are all ready. And during the recess we have been able to work out some stipulations.

All of the stipulated facts are subject to objection by any of the parties as to relevancy or other legal grounds.

The parties stipulated (I) that the plaintiffs were employed at the San Antonio Terminal of East Texas Motor Freight without regard to their race, color or national origin.

THE COURT: That means, Mr. Weiss, the original employment?

MR. WEISS: Yes, sir, that's right, Your Honor. (2) The no-transfer rule of East Texas Motor Freight, that is, no-transfer between classifications which would include no-transfer for the city to road or road to city has been uniformly applied [6] without regard to race, color or national origin.

(3) The standards and qualifications of East Texas Motor Freight for road drivers are not discriminatory.

(4) Except for one road driver employed by Valley Copper State Freight Line who was transferred from San Antonio immediately after the merger of Valley Copper State and East Texas Motor Freight, East Texas has never had any road drivers domiciled in San Antonio or at the San Antonio Terminal.

(5) That prior and subsequent to the effective date of Title 7 of the 1964 Civil Rights Act to the date that

Jesse Rodriguez filed the charge of discrimination with the Equal Employment Opportunity Commission, East Texas Motor Freight had never employed a Negro or Mexican-American as a line driver in the State of Texas covered by the Southern Conference Area Supplemental Agreement.

(6) Except to being received and filed locally by the then terminal manager Sager in August 1970, East Texas Motor Freight never considered the written applications for employment as road drivers of the three plaintiffs and Trinidad Gomez. Such applications were transmitted to the Dallas Corporate Office of East Texas Motor Freight subsequently to the filing of the EEOC charges involved herein.

Now, (7) is a delineation or a statement of the contentions being made by the plaintiffs in this case, narrowed down, as we did in the other cases.

[7] (7) The claim of discrimination of the plaintiffs is solely based upon the fact that after their original employment they have been "locked in" to the lower paying job of a city driver and denied the job as a line driver because of:

(a) The maintenance of separate seniority rosters for city drivers and line drivers.

(b) The fact that any city drivers regardless of their race, if they transferred from city driver classification to road driver classification loses his accumulated city seniority.

(c) The defendant, East Texas Motor Freight discouraged enquiries from plaintiffs concerning the qualifications and/or availability of line driver jobs.

(d) The fact that the defendant, East Texas Motor Freight, has always employed Anglo-White applicants as road drivers.

(e) That the companies policy in practice for recruiting line or road drivers has been based to a great extent on a word-of-mouth system since the companies line driver and supervisory terminal personnel are almost exclusively Anglo-White, such practice has continued the alledged illegal exclusion of Mexican-American and Negroes as road drivers.

(8) That the only issue presently before the court pertaining to the company is whether the failure of the defendant, East Texas Motor Freight, to consider plaintiff's line [8] driver applications constituted a violation of Title 7 and 42 USC Section 1981.

Have I covered everything? I believe that's it.

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[10] MR. BAAB: Your Honor, this is a stipulation between plaintiffs and the defendant Southern Conference entered into as a result of a request for admissions made by the plaintiff which I will read into the record now.

THE COURT: You may proceed to do so.

MR. BAAB: It is a stipulation between the parties which I gave you that the National Master Freight Agreement covering over-the-road and local cartage employees of private [11] common contractors and local cartage carriers and supplemental agreements thereto for the period April 1, 1970 to June 30, 1973, constitute the collective bargaining agreements governing the terms and conditions of employment of defendant East Texas Motor Freights city driver and road driver personnel respectively within the area of the State of Texas, within the jurisdiction of the Southern Conference of Teamsters.

Copies of both agreements are listed as plaintiff's exhibits 15 and 16.

The afore-said agreements are contracts between the defendant, East Texas Motor Freight and the various local

Teamsters unions who are in fact signatory parties to said agreements. Negotiations leading to the adoption of the Master Freight Agreemnt were conducted on behalf of the local unions by negotiating committees designated by the International Brotherhood of Teamsters and composed of Teamster Union officials affiliated with the Intertional Brotherhood of Teamsters or Southern Conference or various local unions.

Supplemental agreements were negotiated by negotiating committees consisting of representatives of the International Brotherhood of Teamsters or Southern Conference of Teamsters or local unions within the jurisdiction of the agreement. The local teamster unions having members within the respective bargaining unit or units conveyed powers-of-attorney to the negotiating committee or committees. After negotiations, the [12] proposed collective bargaining agreements were submitted to the affected Teamster local unions for acceptance or rejection by the local union members. Upon acceptance by the local union members, the agreements are printed, one covering road drivers and one covering city drivers. Contracts are signed by a representative of the local union and the employer or its representative.

The parties reserve the right to submit further evidence with respect to the above matters. Again, that's a stipulation between the Southern Conference of Teamsters and and the plaintiffs.

THE COURT: I understand, Mr. Baab. That stipulation will be made officially a part of the record in the case. Now, are there any further stipulations, gentlemen, that you would like to bring to the attention of the court at this time.

MR. HEIDELBERG: Your Honor, this would not be a stipulation, but the contention of the plaintiffs with regard to the Southern Conference and the local union are incor-

porated within the pretrial order and I would make reference to that.

THE COURT: I'm going to enter all of the pretrial orders and make them a part of the record in this case. And all of the proposed pretrial orders which set forth the contention of the parties, the disputed issues of fact and law [13] and the various requested findings of fact and the like will be made into one pretrial order. In other words, I'm going to approve all of the proposed pretrial orders and I will make that as my pretrial order.

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[21]

Jesse Rodriguez

called as a witness in his own behalf, was duly sworn and testified as follows:

DIRECT EXAMINATION

BY MR. HEIDELBERG:

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[22] Q. Do you recall the initial date of your employment? A. September 65.

Q. What position did you take when you were first employed by East Texas Motor Freight? A. City driver.

Q. Have you ever been a member of the union? A. Prior to that?

Q. At any time. A. No. I have never been a member of any union prior to joining Local 657.

Q. When did you join Local 657? A. I believe it was about April 65.

Q. Are you still a member of Local 657? A. Yes, I am.

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[24] Q. Mr. Rodriguez, have you ever made application for any other position at East Texas Motor Freight? A.

Yes, I have. I inquired about the possibilities of becoming a line driver with East Texas Motor Freight.

Q. Do you remember when that was, Mr. Rodriguez? A. Are you asking me when I first applied in writing or—

Q. Yes, the first time you applied in writing. A. That would be August 1970.

MR. HEIDELBERG: May I approach the witness, Your Honor?

THE COURT: Yes, you may, Mr. Heidelberg.

Q. (By Mr. Heidelberg:) Mr. Rodriguez, let me show you what has been marked as Plaintiff's Exhibit 5 and ask you whether or not you can identify that particular document. A. Yes, I can.

Q. And what is that? A. This is a letter that Mr. Sager had me sign in his office that they would consider me an employee as a line driver.

Q. If you know, Mr. Rodriguez, could you explain the circumstances that led up to Mr. Sager giving you this line drivers application? A. The only way I can explain it is that Wes Sager called me in his office one day and told me that Ezra Beierle [25] an employee at ETMF in the management division had told him that I was interested in a line drivers position, and therefore he was calling me into the office to sign this letter.

Q. Did Mr. Sager say anything to you with respect to this particular letter? A. No, sir. That was all there was to it, that he wanted me to sign it and he would keep a copy and let me have a copy of it.

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[26] Q. Following the filing of your application, has the company contacted you with respect to this particular application? A. You said prior?

Q. After you filed your application has the company contacted you with respect to the application? A. No, sir, they have not contacted me.

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[27] Q. (By Mr. Heidelberg:) Have you ever seen a Negroe or a black line driver come into the terminal at San Antonio? A. No, sir, I have not.

Q. Have you ever seen a Mexican-American line driver for ETMF come into the terminal, drive into the terminal at San Antonio? A. No, sir, I have not.

Q. Mr. Rodriguez, prior to your filing this lawsuit, [28] did you take any other action? A. Prior to filing this lawsuit?

Q. Yes. A. Yes, I contacted my local and told them I was interested in going on the road as a line driver, and also the company.

Q. Which individual with the local did you contact? A. I believe the first time, it was at a special meeting at Local 657 Hall. And it was brought up to the President's attention, Mr. Ray Shafer.

Q. Could you describe the circumstances that surrounded that particular event? A. Well, during that time it was known that we were to merge with VCS. And there were other things to be brought up also at that meeting. And this was one of the things that was brought up, the line drivers.

Q. Is it your testimony that you, yourself, mentioned it to Mr. Shafer? A. Yes.

Q. Exactly what did you say to him? A. The exact words, I just can't remember the exact words, but I do remember that I asked—I told him I was interested in going on the road after we merged.

Q. Was there any other occasion in which you mentioned this same topic to Mr. Shafer? [29] A. I believe we ran into each other there at the dock, at the East Texas dock on two different occasions. And I asked him if he had heard anything or done anything about it. And he said he would look into it.

Q. He said he would look it? A. Yes.

Q. Did that happen at both situations? A. The road

driver, that's what I was asking him about. And he said he would look into it.

Q. The first time you spoke to Mr. Shafer at the Hall, what response did you receive from Mr. Shafer? A. He said he would check into it.

Q. The first time you spoke to Mr. Shafer at the Hall, what response did you receive from Mr. Shafer? A. He said he would check into it.

Q. Your testimony is that you contacted Representatives of the company. Could you describe to the court the circumstances surrounding those particular requests? A. Well, when I did contact the company officials, we had merged by that time or we were about to merge about that time. I asked Ezra Beierle if I could get on the road after we merged.

Q. When did you ask Mr. Beierle this? A. The exact date of the month I don't quite remember. I think it might have been around February 1970.

Q. Do you remember the exact language that you used in your questioning to Mr. Beierle? A. Not the exact language, but I remember asking him [30] or telling him that I wanted to go on the road after we merged and there was a possibility then.

Q. What was Mr. Beierle's response to that? A. That he didn't—I can't remember exactly what he said either, but it had something to do—that is, he didn't know what they were going to do yet.

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CROSS EXAMINATION,

BY THE COURT:

Q. Let me ask you this, Mr. Rodriguez: You testified, and correct me if I'm wrong, the basic text of your testimony is that the purpose of keeping you here in town as a city driver was to keep the Mexican-American and Negro

in the cities and not let them get out on the road and receive higher paying line jobs. That is your contention, is that right? A. Yes.

Q. Keep the blacks and Mexican-Americans confined to the cities. That's what you said, isn't that true? A. That's right.

Q. You say "They." Who is they? Who do you say is responsible for that? A. Well, I believe—

Q. Is it the local or the international parent union or is it the employer? Who do you say is responsible for this [31] and what facts do you have to show that this was done by one or more of these defendants to prejudice you because of your race? A. Well sir, I believe that—when I say "They", I include the company and the local that represents me because they do negotiate these two separate contracts.

Q. I realize that the evidence is such that there are no Mexican-American line drivers or black line drivers perhaps and if there are, the number is disproportionate to the population here locally. But what facts do you have that would show that this was done, that you were refused the right to move from a city driver to an over-the-road driver merely because, merely because of and solely because you are Mexican-American? A. The only proof and facts that I have are the ones pertaining to myself. The opportunity that was denied me.

Q. Just because the opportunity was denied you is not necessarily enough. You have got to also establish that it was done because of some racial discrimination. You said that, but what are the facts to support you? A. Well, I believe that the statement you made, that in and of itself is a fact. The numbers are disproportionate as to the numbers of population here in the state, this part of the state. That in and of itself is a factor.

Q. In other words, you are relying strictly on the numbers? [32] A. Yes, sir.

THE COURT: All right, you may cross examine.

CROSS EXAMINATION

BY MR. WEISS:

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[33] Q. You have never had any experience in over-the-road driving, have you? A. Yes, I have.

Q. What experience have you had? A. I drove on the road for Dentler Fax from here to Houston.

Q. And what kind of equipment? A. It was a 45 foot trailer and a single axle.

[34] Q. And that was while you were on lay-off status from East Texas, is that right? A. Yes, sir.

Q. And when was that? A. When was the time that I started working at Dentler?

Q. Yes. A. Or at the time I was layed off?

Q. Well, how long were you on lay-off status? A. I can't remember the exact time, but something around 14 to 16 months.

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Q. I mean, that's correct, isn't it? You have never had over the road experience for a truck line? A. No, sir, I haven't.

[35] Q. All right, sir. All right. Now, you went to work in September 1965. And in October, you had an accident. That's correct isn't it? Do you remember the accident you had a short time after you went to work?

MR. HEIDELBERG: Your Honor, I have my objection on this line of testimony, is that correct?

THE COURT: Yes, you have. I'll give you a running objection so that you won't have to rise.

MR. HEIDELBERG: Yes, Your Honor.

THE COURT: You have a running objection to this entire line of testimony. I will overrule your objection.

Q. (By Mr. Weiss:) Will you tell us about that, Mr. Rodriguez? A. This was in October, did you say, sir?

Q. October 9, 1965. Well, you won't deny that you had an accident, will you? A. No, I won't deny it.

Q. And the details of the accident of course appear in these exhibits which have already been introduced in evidence. A. Yes, sir.

Q. Now, most of your experience as a city driver has been driving bob-tail trucks? A. Yes, sir.

Q. I think you told us when your deposition was taken that 65 percent of your time you drive these small bob-tail [36] trucks around town? A. Yes, sir.

Q. And in March 1966 you injured yourself on the job. You had a Workman's Compensation claim based upon an injury that you had. A. Yes, sir.

Q. All right. Then in May, May 19, 1966, and I'm not going into these in detail because they do appear in the record, you had an accident. A. Yes, sir.

Q. Mr. Beierle who is the Assistant Terminal Manager criticized you for—he cautioned you about being careless, isn't that correct? A. No, sir, that is not correct.

Q. You deny that he did that? A. Yes, sir.

Q. Then in July 1969, July 1969 you had another injury. You sprained your wrist? A. Yes, sir.

Q. Then in September 1970 you backed your bob-tail truck into a display case, isn't that correct? A. Yes, sir.

Q. You claimed that your foot slipped ff the brake and hit the accelerator? A. Yes, sir.

[37] Q. And then in July 1971 you received a warning letter because of an incident that occured over at the Universal Bookbindery? A. Yes, sir.

Q. And the company's investigation and the facts revealed by that investigation as far as the company was concerned is revealed in the warning letter of August 9, 1971 which appears in the record. That's correct, isn't it? A. Yes, sir.

Q. And according to Mr. Asbury who was the Terminal Manager at the time, Universal Bookbindery gave instructions to the company that you were not to make any more

deliveries over there, isn't that correct? A. I don't know that as a fact.

Q. Okay. But you know that's what Mr. Asbury's letter said, isn't that correct? A. Yes, sir.

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[45]

Modesto Herrera

Called as a witness by the plaintiffs, was duly sworn and testified as follows:

DIRECT EXAMINATION

BY MR. HEIDELBERG:

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Q. Mr. Herrera, how long have you worked for ETMF? A. Regular, since May 3, 1965. Prior to that I worked casual in 1964.

Q. What type of work were you doing when you were [46] initially employed by ETMF? A. Most of the time I was driving in the city. Sometimes I would do dock work and check freight.

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Q. What type of equipment have you handled during your work experience with East Texas Motor Freight? A. Well, I have driven a truck and trailer. They told me I was the best truck and trailer there. That's why they wouldn't give me a bob-tail until I complained around 1969 or something like that. I told them that the junior men would have to learn how to drive a trailer, and give me a break driving a bob-tail. They they started giving me a bob-tail sometimes, and then back to a trailer. Most of the time truck and trailer.

Q. Who was the individual that told you this? A. Mr. Beierle.

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[47] Q. Have you made application for any other position with East Texas Motor Freight other than your initial application for employment? A. I made a written application to Mr. Sager in August of 1970 for a line driver job.

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Q. (By Mr. Heidelberg:) Did the company ever correspond [48] with you concerning this application? A. No one has ever approached me with regard to my application for the road.

Q. Can you tell the court the circumstances that surrounded your filing this application with Mr. Sager? A. I found out that they didn't have no Mexican-American line drivers and blacks. I always wanted to be a line driver. I always wanted to have an opportunity to be a line driver because they made more money. And since I was there in 64, I approached Mr. McCracken about being a line driver and also some of the other officials there. But nothing was done.

Q. Did you approach him in written or oral fashion? A. It was oral. Everything was oral.

Q. Can you remember the times you approached Mr. McCracken, Mr. Herrera? A. I believe it was in April 1965 when I talked to Mr. McCracken to tell him that I wanted to be a line driver, what was the procedure for me to be a line driver for East Texas Motor Freight.

Q. And who else did you speak to? A. Mr. Asbury in the early part of 65 and the later part of 65.

Q. You say Mr. Asbury? A. Mr. Asbury.

Q. What was your reason for filing this lawsuit? [49] A. Because I made an application, I have asked for a road drivers job since 65. Then in 1970 I made out a written application for the road. And since I didn't have no response from the company or any other official from ETMF, I felt that they were discriminating against me, that they didn't want me to be a line driver.

Q. Have you ever seen a Mexican-American line driver come in to the ETMF Terminal? A. No, sir.

Q. Have you ever seen a black or Negro line driver come in to the ETMF Terminal? A. No, sir.

Q. Did you contact the union, your local union with respect to obtaining a line drivers job? A. Yes, sir. I talked to the President of Local 657.

Q. Who was that at that time? A. Mr. Ray Shafer.

Q. And when was it, if you can remember? A. The exact dates—I don't recall, but I talked to—I got up in one of the meetings when I found out that ETMF Freight System was going to buy VCS, and VCS had road drivers domiciled here in San Antonio, and I asked, I got up there in the meeting and told Mr. Shafer I would want to be a line driver, and if I had an opportunity I would like to get one.

Q. What, if you can remember, did Mr. Shafer say in [50] response to your request? A. Well, he said, as I recollect he said "Just wait until we purchase VCS and then we will see what we can do about it."

Q. Did you ever have any other conversation with Mr. Shafer concerning the obtaining of a road drivers job? A. A couple of other times.

Q. Tell the court about those instances. A. I was there in the Union Hall and I saw Mr. Shafer. He was there in the office, and nobody was in there. And I went in to talk to him. I always wanted to be a line driver and I said "maybe he can help me." So I asked him if he could help get me a road job.

Q. What did Mr. Shafer say to you at that time? A. He said that we had two different contracts, one for the city and one for the road. I couldn't be transferred.

Q. You mentioned I believe that you spoke to him with reference to this matter on two occasions. Do you remember the second time? A. Dates, I don't recall, but it was the same place, in his office.

Q. And what did you say to Mr. Shafer at that time? A. I was determined that I wanted to see if he could help me get a line drivers job.

Q. What was his answer? [51] A. Same thing, that they had two different contracts, one for the city and one for the road and I couldn't transfer.

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[55] Q. All right. Now, you never have applied for a road driver job at any East Texas Terminal where they have road driver domiciled, have you? A. No, sir.

Q. The only place that you have applied was here in San Antonio where you knew they didn't have road drivers domiciled? A. That's correct.

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[57] A. I am 45.

Q. 45, and what is your height? A. 5-11.

Q. How much do you weigh? A. 235.

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[60] Q. I'm not talking about them individually but I mean its clear from your testimony that you have suffered a great many injuries. A. Yes, sir, I have.

Q. A great many accidents. A. Yes.

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[64] Q. That if you transferred, you would have to go down to the bottom of whatever roster you transferred to. If you transferred to Dallas, you would be at the bottom of the road driver's roster? A. That's right.

Q. And then you told us when your deposition was taken that you were not prepared to do that at this time? A. I told you I would think about it.

Q. But you were unwilling to tell us, give us an answer at that point whether you were willing to give up your city seniority and go to the bottom of some roster at a place where the company had— A. I was willing when I made my application in 1970, I was willing to give up my—

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[65] Q. And you don't know whether you could qualify as a road driver according to the company standards and

qualifications You don't know that at this time? A. Well, if you check your records, I took a test. They gave me a road test in 1971 and I passed it. And they gave me a test, a written examination in 1971 and I passed it too.

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[69] MR. WEISS: Your Honor, Mr. Heidelberg is now purporting to adduce testimony from a gentlemen named Gomez who is not a plaintiff and we don's see how his testimony would have any relevance. This is not a class action. And as I understand the situation, Mr. Gomez applied for a road drivers job and never filed any EEOC charge. He didn't choose to be a party plaintiff in this suit. I don't see how his [70] testimony would have any relevance or materiality.

THE COURT: I assume, this being a matter before the court, that Mr. Heidelberg probably has in mind using witness to establish a general practice and to show that this man was similarily treated although he may have no personal complaint. It would merely corroborate the testimony that such a practice exists. For that limited purpose—

MR. HEIDELBERG: For that purpose and also, Your Honor, it has not been established that this is not a class action. The allegation is made in the complaint and there have been no motions filed. The answers of the defendant deny that this is a class action, but of course we maintained that there is class action involved.

THE COURT: Well, are you contending now as far as this trial is concerned that this is a class action?

MR. HEIDELBERG: Yes, Your Honor.

THE COURT: And how many people are you going to try to establish this by?

MR. HEIDELBERG: As outlined in the complaint Your Honor, the class would consist of the Mexican-American and black city drivers who are located in the State of

Texas, covered by the jurisdiction of the Southern Conference Supplemental Agreement.

THE COURT: Well, it hasn't been urged to this court that this is a class action. I'm not sure that it is a [71] proper case for a class action. I have had quite a few of those class actions. I'm not sure that this is the type of thing that would come within a class action. Aside from that.

MR. HEIDELBERG: Aside from that, Your Honor, I think testimony as to the general practice of the company especially in this situation—

THE COURT: All right, I'm going to allow you for that limited purpose. But by what authority do you bring this suit for a class? Have you been employed by everyone of the people in this conference to bring this suit for them?

MR. HEIDELBERG: No, Your Honor, but I don't think that the law requires that.

THE COURT: Well, what about these people who have filed these other suits? Are you representing them also. You have got other people in Leeway and Yellow and they are in the same class with these people, aren't they?

MR. HEIDELBERG: No, Your Honor. They are not employed by the same defendant.

THE COURT: In other words, you are saying that your class refers only to this one defendant?

MR. HEIDELBERG: Yes, sir.

THE COURT: All right, I will leave that open.

MR. WEISS: I would like just to make one further observation with reference to the class. It seems to me that he alleged that it should be a class action. All of the [72] defendants denied that it should. I think it was incumbent upon him prior to the trial to have filed a motion to establish that it was a class action.

THE COURT: I agree. But just for this one witness, unless it gets to [sic] far out of hand, Mr. Weiss—he is also offering this witness for the limited purpose of showing the general company practice which would coincide and corroborate the testimony of the parties in the case. I am certainly going to allow it for that purpose and I will keep the question of the class open.

Trinidad Gomez

called as a witness by the plaintiff, was duly sworn and testified as follows:

DIRECT EXAMINATION

BY MR. HEIDELBERG:

• • • • • • • • • •

Q. And who are you currently employed by? A. ETMF Freight System.

Q. How long have you been employed by East Texas Motor Freight? A. Twenty years.

[73] Q. And could you tell us where you were initially employed? A. At the ETMF Terminal on Avenue B.

Q. Is that here in San Antonio, Texas? A. Yes, sir, here in San Antonio.

Q. And what positions have you held other than city driver if you have held any other positions? A. No, just the city driver.

Q. What is your seniority there with the company? A. March 5, 1952.

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Q. (By Mr. Heidelberg:) Mr. Gomez, I want to show you what has been marked as plaintiff's Exhibit 8 and ask you whether or not you can identify this particular document? A. Yes, that's my application for a drivers job with ETMF.

Q. When do you recall filing that application? A. It was back in September 1970.

Q. Would you explain to the court the reason for your [74] filing this application? A. I wanted to better myself a little bit. I wanted to get a job on the road, get paid more money.

Q. Have you heard anything from the company with reference to this application? A. No, sir.

Q. Could you tell the court the different type of equipment you have driven during the course of your employment at East Texas Motor Freight? A. Well, I drive just about—I drive all of the equipment that East Texas has. Tractors, trailers, city tractor-trailer, road tractor-trailer, bob-tail, forklift, just about all equipment East Texas has.

Q. Mr. Gomez, you have been employed there since 1952. During that period of time, do you know of any Mexican-American road drivers who have come into the San Antonio Terminal for East Texas Motor Freight? A. No, sir.

Q. During that period of time do you know of any black or negro [sic] road drivers who have come into the San Antonio Terminal for East Texas Motor Freight? A. Not to my knowledge.

Q. What is your national origin, Mr. Gomez? A. Mexican-American.

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[75] CROSS EXAMINATION

BY MR. WEISS:

Q. Mr. Gomez, in this application for a drivers job that you signed on September 1, 1970, you stated this: I fully realize that if I am accepted as a road or line driver I will lose my city seniority on the date of my employment which was 5 March 1952. Were you willing to do that at that time? A. Yes, sir.

Q. Willing to give up 18 years of seniority? A. Yes, sir.

Q. You were willing to do it? Did you realize that if you did that and got a road drivers job in some place where the company has road drivers like Dallas that you would be at the bottom of the road driver's roster? A. Yes, sir.

Q. And that by virture of being at the bottom of the roster, your chance for steady work might be very remote. You realized that? A. Yes, sir.

Q. And you might not get much work at all, you realized that? A. Yes, sir.

[76] Q. Or you might not get any work, you realized that, with no seniority? A. Yes, sir.

Q. And at the time you filed this application, you seriously wanted to do that? A. Yes, sir.

Q. How long have you lived in San Antonio? A. All of my life except for the time I spent in the service.

Q. Do you have a home? A. Yes, sir.

Q. Do you have a family? A. Yes, sir.

Q. How many children? A. I have two step-sons and a son.

Q. You were willing to pull up stakes and move to some far distant place where the company might have road drivers, is that your testimony? A. Yes, sir.

Mr. Weiss: That's all.

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[79] Q. (By Mr. Heidelberg:) Did you understand my last question, Mr. Salinas? A. Yes, whether I heard any members or knew of any members who had asked our local for road driver positions.

Q. Yes. A. Yes, sir, I have.

Q. Could you tell the court the different circumstances and times surrounding those particular requests? A. Well, back in the early 60's when a member would ask, he would be told that there were two seperate contracts, that there were no transfers. Then in the late 60's, middle 60's we were told that we could transfer but we would have to lose our seniority.

Q. Do you recall in the early 60's who with the union told you that? A. Well, Mr. Ray Shafer told us that on at least three occasions that I know of.

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[83] Cross Examination

By The Court:

Q. Let me ask you this: In the course of any of these conversations with the employees and the employers at Roadway, that is, the people in charge, the employees, your co-workers or within the union itself, was any of this motivated by prejudice against you or any of the other men or employees because of their race, because they were Mexican-Americans or black? A. I believe that, yes, sir.

Q. You believe that. But now what facts can you give me to substantiate this? A. The fact that our local never was able to acquire any road driving jobs for any of us Mexican-Americans or blacks who asked for it.

Q. Well, of course now in this particular situation I don't believe there are any line drivers domiciled or residents of San Antonio that work for East Texas Motor Freight, are there? A. No, sir, but——

The Court: What about Roadway? Does Roadway have line drivers living here? A. No, sir, in Dallas. But we are prepared to make that move.

Q. Give up your seniority and make the move to Dallas. All of you are prepared to do that that made application. Now, [84] are there any others besides blacks or Mexican-Americans that are also asking for transfer? A. No, not that I know of. Not at this moment.

Q. You don't know of any Anglos that live here locally or others? A. No, I don't.

Q. That have made such an application. Only the blacks and the Mexican-Americans according to you have made such an application to transfer and they have been, according to you, systematically denied. A. Yes, sir.

Q. No, no one has ever told you, either the union or any of the employers that you have mentioned, East Texas Motor Freight, Roadway or any of them have ever told you that this was because of your race or someone elses race, have they? A. They haven't told me that, no, sir.

Q. It is just the fact that these applications were made and not granted that makes you feel like you are being discriminated against because of your race? The fact of the statistics? A. Yes.

Q. By the numbers in other words? A. Yes, sir, by the numbers.

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[86]

Sadrach G. Perez

called as a witness by the plaintiff, was duly sworn and testified as follows:

DIRECT EXAMINATION

BY MR. HEIDELBERG:

Q. Would you state your name for the record? A. Sadrach G. Perez.

Q. What is your address, Mr. Perez? A. 7906 Niagara.

Q. Who are you presently employed by? A. The Mexican-American Unity Counsel.

Q. And prior to that, who were you employed by? A. East Texas Motor Freight.

Q. What was the initial date of your employment with East Texas Motor Freight? A. November 16, 1959.

Q. How long were you employed by East Texas Motor Freight? A. About 13 years as far as I can remember.

Q. What occasioned your leaving East Texas Motor Freight? A. What?

Q. Why did you leave your employment with East Texas Motor Freight? A. I was terminated.

Q. Do you remember the date that you were terminated? A. May 18, 1971.

[87] Q. What type of work did you do while you were employed by East Texas Motor Freight? A. I was a city pickup and delivery driver, performing all of the dock duties and freight handling, driving bob-tails, tractor-trailers, road tractors, city tractors, forklifts and things like that.

Q. What do you mean by "Dock"? A. Dock work.

Q. Would you explain to the court the circumstances surrounding your discharge from East Texas Motor Freight? A. I was given, I believe it was, five or six letters saying that my production, or rather my job was unsatisfactory. This all happened after I filed charges with the Equal Employment Opportunity Commission, after I had submitted an application that I was seeking a road drivers job.

Q. When did you submit this application? A. The application I submitted, the date was August 20th or 21st, 1970.

Q. Did the company ever take any action with respect to your application for a road driver job? A. Other than firing me, no.

Q. What reasons did the company give you for discharging you? A. The letters that they used in my discharge, some said the fact that I did a certain amount of work and I took • • •

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[91] by the company, I had nothing prepared. I wanted to answer and Brother Shafer who was there with me advised me not to answer.

Q. Did your national origin come up at any time during the grievance hearing? A. I don't remember if it did. I don't think so.

Q. Did the fact that you had filed charges with the Equal Employment Opportunity Commission come up during the grievance hearings? A. I don't remember. I don't believe so though.

Q. Mr. Perez, basically tell the court why you filed your charges with the Equal Employment Opportunity Commission and why did you file this particular lawsuit? A. I have always wanted to be a line driver with that company. And it was my understanding due to no accidents on my good driving record and my work performance which I thought was very, very good, the company disagreed at the end, but I was performing my duties and I believe that I qualified to be a road driver. And I wanted a job on the road. It paid better. I believe I could better myself, and I kept asking for a road job, and always I was turned down in different ways. I was discouraged by being told that I didn't really want to move out of town and things like this. But I just—I wanted to drive on the road and I do up to this date.

Q. Why did you want to drive on the road? [92] A. Well, first of all I enjoy driving trucks. I would like to better myself. As far as the pay is concerned, it is higher. And I believe I am qualified to be a road driver.

Q. Did you ever make any attempts to find out from the local union as to whether or not you could become a road driver for East Texas Motor Freight? A. Yes.

Q. Would you explain to us what those events were? A. There were several times when I discussed it with the President of the Local Union who is Ray Shafer. And since I didn't remember the exact dates or the exact instances of what really was said one way or another, I didn't mention other than three that I was sure that I could remember. One time, it was in 1966, I discussed it with Mr. Ray Shafer. And he told me that I could not transfer because I was bound by a city contract. I could not transfer into the road contract. It was another contract.

And then pretty close to the time when I go fired, around, I believe it was April 1970 that I asked at an Executive Board Meeting and at a regular membership meeting. That's the three times that I can remember.

Q. Did you bring this fact to the Southern Conference of Teamsters attention? A. I did not know which way to

go or who to make my intentions known. So what I did, I wrote a letter to Mr. Frank [93] Fitzsimmons. At that time he was the Acting President for the international union.

MR. HEIDELBERG: May I approach the witness, Your Honor?

THE COURT: Yes, you may.

Q. (By Mr. Heidelberg:) Mr. Perez, let me show you what has been marked as Plaintiffs Exhibit Number 9 and ask you whether or not that's the letter that you are testifying about? A. Yes, it is.

MR. HEIDELBERG: Your Honor, I think the letter will speak for itself.

Q. (By Mr. Heidelberg:) Did you receive a response from Mr. Fitzsimmons concerning this particular letter? A. Yes, sir, about a week-and-a-half later.

MR. HEIDELBERG: I'm sorry, Your Honor, may I approach the witness again?

THE COURT: Yes, you may.

Q. (By Mr. Heidelberg:) Let me show you what has been marked as Plaintiffs Exhibit Number 10 and ask you whether or not this is the letter you received in response to your letter to Mr. Fitzsimmons? A. Yes, it is.

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CROSS EXAMINATION

BY MR. PENSHORN

[131] Q. You had just been discharged by East Texas and had just lost your grievance before the grievance committee. Did you seriously think at that time that you could get a road job with East Texas after having just been fired by them? A. I had been fired due to the fact that Mr. Shafer and you, sir, did no represent me over there in Dallas.

Q. I understand. But my question is did you think that you could get a road drivers job after the company had fired you? A. I thought that I was going to get back on

the company because I was unjustly fired and I was going to see what I could do to get back to East Texas, which is what I eventually did.

Q. Was there anything else said about road driver jobs on that occasion that you can recall? A. No. We discussed other jobs, about organizing some place in Corpus Christi. And Mr. Shafer offered me a position over there and said he would pay my utilities and my rent, and that was it. No other moneys.

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[132] Q. Was that all that you said? A. As far as I can remember, yes.

Q. And you have told us all that he said? A. I think that it was, yes.

Q. All right. Now then, on the third occasion, what did you say about a road job when you told us you mentioned it [133] at a general membership meeting? A. I believe it was the membership meeting right after the executive board meeting, of which I was an officer. And I sat right next to Mr. Shafer. When the question came up, I believe it was Modesto Herrera from the meeting room floor, inquiring about a VCS Merger and consequently road jobs by the two companies merging, I turned around to him and I said "Yes, Ray, this is what I was asking you about." And when he answered he answered me and the general membership saying very briefly that he would look into the matter. That's as closely as I can remember.

Q. Did he say anything else? A. He might have said something else, but I don't remember.

Q. Did you say anything else on that occasion? A. No. I spoke very little myself.

Q. Now, those are the only three times, are they now, that you have spoken to Union Representative Shafer about road jobs, is that right? A. That I have spoken about it, yes. Myself.

Q. All right. Now, on no occasion, Mr. Perez, did you ever complain to Mr. Shafer that East Texas Motor Freight was

discriminating against Mexican-American and Negroes, did you, sir? A. Not in those words, no, sir.

Q. All right. Now, one of your complaints is the [134] contracts in this case, are they not? A. Yes.

Q. All right. I'd like to ask you to turn to your deposition before you, page 95. Did you find it, sir? Now, look at line 15, please, and follow what I read.

"Q. There have been meetings called for the purpose of finding out what the employees of East Texas and other freight lines to be affected by the contract want, is that right?"

Your answer was "Yes."

Right, sir? A. Right.

"Q. All right. Now, have you attended some of those meetings?

"A. Yes.

"Q. All right. Now, at any of those meetings, Mr. Perez, have you personally ever requested that a demand be submitted for a single contract for road and city drivers working for East Texas Motor Freight?"

And wasn't your answer, "Not in those terms, [sic] No." A. Yes.

Q. "Q. And in what terms have you spoken about it?

"A. Requesting about the road, the pay, the advancement and things of that nature.

"Q. You have never made a request that one contract [135] be negotiated for all road and city drivers of East Texas, is that right?

"A. Right.

"Q. Have you ever heard any other employees of East Texas request such a contract?

"A. No."

Is that what you testified to, sir? A. "Have you ever heard any of the other employees of East Texas at any of those meetings make such a request."

Q. And your answer? A. "No."

Q. No. Okay. Mr. Perez, when East Texas Motor Freight bought Valley Copper State System, the two seniority lists or the city drivers working for the two companies under the jurisdiction of 657 were merged, dovetailed, were they not, sir? A. Yes.

Q. And did you not complain bitterly about that merger at that time? A. I don't know if I complained bitterly. I complained about it because it knocked me down about 14 slots.

Q. But in this suit you are seeking a statewide merger of all road and city seniority lists, aren't you? A. Road and city lists, yes.

MR. PENSHORN: That's all the questions I have.

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[141]

Ed A. Asbury

called as a witness by the defendant, was duly sworn and testified as follows:

DIRECT EXAMINATION

BY MR. WEISS:

Q. Will you state your name for the record, please. A. Ed A. Asbury.

Q. Where do you live, Mr. Asbury? A. 6034 Winding Ridge, San Antonio.

Q. What is your business or occupation? A. I'm Terminal Manager for East Texas Motor Freight in San Antonio.

Q. How long have you been Terminal Manager of East Texas in San Antonio? A. Two years this past month.

Q. What did you do prior to coming to San Antonio as Terminal Manager? A. I was superintendent of terminals for East Texas [142] Motor Freight.

Q. Stationed where? A. In Dallas, Texas.

Q. In Dallas. How long were you superintendent of terminals? A. Ten years.

Q. You have been with East Texas since when? A. 1961.

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[156] CROSS EXAMINATION

BY MR. HEIDELBERG:

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[167] Q. Let me ask you this, Mr. Asbury: If an employee came to your office, a city driver now, and wanted to make an application to get on the road, how would he go about doing that according to your own belief? A. He would probably go to the Terminal Manager and make that request.

Q. In other words, he could file a written application with the Terminal Manager and that would be forwarded to Dallas to the Corporate Headquarters, is that correct? [168] A. I think it would be.

Q. And that would be the standard procedure that would be followed by you, is that correct? A. This is the way that I would handle it.

Q. I spent several hours going through a lot of files in Dallas when I was up there. And it appeared to me that there was just about everything pertaining to employees in those Personnel Folders. Based upon that, is it your practice to send to Dallas just about everything that is in an individual's Personnel Folder here in San Antonio? A. Yes, sir.

Q. In other words, if a person applied for a transfer to a road job, you would immediately forward that to Dallas, would you not? A. I would have.

Q. Did you ever have an occasion to discuss the no-transfer policy with Mr. Shafer who is the President of Local 657? A. I don't recall ever having discussed it with him.

Q. You have been employed by ETMF. I believe you testified that you, as the Director of Terminals, went throughout the entire system, at least in the Southern Conference, is that correct? A. Yes, sir.

Q. And also on the deposition I believe you testified [169] that you served as Replacement Terminal Manager for vacationing Terminal Managers at various times, is that correct? A. Yes, that's correct.

Q. This would include experiences from 1960 on until the time you became Terminal Manager. A. 1961.

Q. During that period of time have you ever known of a Negro or a black line driver being employed by East Texas Motor Freight? A. I didn't see one.

Q. Have you ever seen a Mexican-American employed as a line driver with East Texas Motor Freight? A. No, sir.

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[178] MR. BAAB: Yes, that's correct. Now, it is my understanding, and Mr. Heidelberg can correct me if I'm wrong, he has agreed to enter into the following stipulation concerning Mr. Smith's testimony in the Yellow Freight case which has now been transcribed. That it, that were Mr. Smith called to testify here and asked the same questions, he would give the same answers as those reflected in the transcription, that is, [179] both the questions and answers reflected in the transcription of his testimony in the Yellow Freight case.

With that stipulation, we don't intend to duplicate.

THE COURT: Any testimony may be considered by this court where applicable here and relevant to the facts in this case.

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[180] DIRECT EXAMINATION

BY MR. BAAB:

Q. State your full name, please. A. My name is W. C. Smith.

Q. You are the same W. C. Smith who testified under oath [181] in the case tried before this court last week, Herrera, et al vs Yellow Freight System, et al? A. Yes.

Q. Mr. Smith, you have been present and have heard the

stipulation entered into the record concerning your testimony in that case. There you testified that you first became familiar and began to participate in negotiations in the trucking industry sometime in the late 40s, is that correct? A. Yes, sir.

Q. All right, sir. I want you to tell the court what the status of collective bargaining agreements covering the freight industry was at that time in terms of breadth. And by that, I mean first of all did there exist at that time area-wide agreements covering segments of the freight industry? A. In answer to the question was there area-wide agreements, the answer is no. The agreements were negotiated by the local union with each individual employer.

Q. All right. And were the majority of those agreements covering both city and road drivers at that time? A. No. They were singular contracts covering singular units.

Q. All right. Well, is your testimony then that the contracts at that time for city and road were in general, separate. A. They were separate.

[182] Q. Were there some exceptions? A. Very few exceptions.

Q. Can you state one such exception? A. One would be the E.T. and W&C in Northeast Tennessee.

Q. In that case, that company had a single collective bargaining agreement covering both city and road drivers? A. Yes, sir.

Q. All right, sir. Are you familiar with that company's present operation? A. Yes, sir.

Q. And is there now a single agreement covering both city and road drivers? A. No.

Q. Are there separate agreements covering both city and road drivers? A. Yes.

Q. All right, sir. Now, are you aware whether subsequent to the time we have been speaking of came to exist, area-wide agreements in the freight industry? A. Yes, sir.

Q. What was the approximate date in which these agreements first came into existence, if you know? A. The first

area-wide agreement in the Southern Conference was in 1951, which became known as the Southeast Area contract and also an additional Southwest Area contract.

[183] Q. State very briefly what the Southeast and Southwest Areas were. A. Basically, the Mississippi River was the dividing line between the two areas.

Q. Now, did you have some hand in the negotiations for the contracts in these areas? A. In 1951?

Q. Yes. A. As a member only.

Q. All right, sir. Now, was there negotiated at that time a common contract covering both city and road drivers in the Southeast area? A. No.

Q. Were there separate contracts? A. Yes, sir.

Q. And would the same be true for the Southwest Area? A. Yes, sir.

Q. Up to this time have there in your experience continued to be separate collective bargaining agreements covering city and road employees in the Southern Conference Area? A. Yes, sir.

Q. Now, did there sometime subsequent to 1951 then come into existence area agreements that extended beyond Southeast and Southwest? A. The National Master Contract became effective in [184] 1964.

Q. All right, sir. That was the first time there was negotiated a national master agreement, is that correct? A. Yes.

Q. All right. And would it be correct to say that the National Master Agreement was accompanied by area supplements supplemental agreements? A. Yes, sir.

Q. And the same is true today, although the areas have changed somewhat, is that correct? A. Yes, sir. There no longer exists a Southeast and Southwest. That was merged in the years 69-70.

Q. So, the contract we are talking about now, the contract covering 1970 to 73, that is the first time there was a National Master Freight Agreement and a Southern Conference Area supplement covering road drivers and then a

separate Southern Conference Area supplement covering city drivers, is that correct? A. Well, it is the first time that it became a common one-contract area, Southern Conference. Prior to then, it had been Southeast, Southwest.

Q. All right, sir. Now, Mr. Smith, what was your job capacity in the year 1969, if you recall? A. In 1969 I acted in a dual capacity. I went to work for the International Unions. And I also had a local union, [185] local 891, Jackson, Mississippi.

Q. All right, sir. You previously have been President of that local union is your testimony I believe? A. Yes.

Q. Are you familiar with what the racial make-up of your local union was in proximate percentages in the years 1969-70. A. Approximately 60 percent white and 40 percent black. That is the approximate figure.

Q. All right, sir. Now, state whether or not you held a meeting of the members of your local union employed in freight industry to discuss proposals to be made for negotiations for the 1970 National Master Agreement and area supplement. A. Yes.

Q. Approximately when was that meeting held and where, if you recall? A. In the latter part of 1969. It would have been in November or December. It was held at the local Union Hall, Jackson, Mississippi.

Q. And was that meeting attended by both city employees and road employees to be covered by the freight agreements? A. Yes, sir.

Q. Now, what was the approximate racial make-up of the employees attending that meeting, if you recall? A. Approximately 50-50.

[186] Q. All right. Fifty percent black and fifty percent white? A. Yes, sir.

Q. And what was the approximate percentage, would you say, of city employees versus road employees attending the meeting? A. There would have been more city employees than road because that was the make-up of that particular local union.

Q. All right, sir. State whether or not there was discussed at the meeting the possibility of merging seniority lists for the city and road employees.

MR. HEIDELBERG: Your Honor, I object to that. Whatever happened in Mississippi I feel is irrelevant to the present case. This particular union is not involved in this litigation.

THE COURT: How is that pertinent to this case?

MR. BAAB: Well, Your Honor, one of r defenses here—it has been somewhat developed in the testimony before. The reason there are separate contracts between city and road employees is because that's what the employees want. It is negotiated on an area-wide basis. The facts already show there are no road employees in this jurisdiction.

THE COURT: Well, I think you have extended it. Go ahead You may inquire.

Q. (By Mr. Baab): Going back to the question, was there [187] discussed the possibility of merging the city and road seniority lists for freight employees in your local union? A. Yes.

Q. And what was the outcome of that discussion? A. A proposal was made by an individual member who was a city employee of ABF Truck Lines requesting that the city-road be merged and there become a common seniority list with all seniority dove-tailed. Once that proposal was made, a general discussion was held on the floor as to the advantages and disadvantages of a merged seniority roster. The man who made the proposal got up and withdrew that request for it to be submitted as a proposal.

Q. All right, sir. Just so that the record may show, was there any physical force exerted on him? A. Oh, no. The individual's name I remember real well was J. B. Herrington.

Q. He withdrew it of his own free will following the discussion? A. Yes, on the basis of what would be the advantages and disadvantages both to city and road.

Q. To your knowledge, was there anybody else present at the meeting who was in favor of merging the seniority lists at the close of the discussion? A. None.

Q. Now, Mr. Smith, have you in your experience as a [188] negotiator in the freight industry come to have the experience of talking with employees concerning the advantages and disadvantages that they feel are inherent in separate seniority systems for city and road? A. Yes.

Q. What are the advantages and disadvantages as you have come to know them that the employees feel? A. One is in regard to physical requirements in the differentiation between the requirements established by law for road driver and city driver or city employee? [sic]

Q. How is that an advantage or disadvantage? A. A road driver is restricted by the Department of Transportation in areas of physical abilities such as eye-sight, a previous heart condition, previous blood pressure, the existence of previous blood pressure. Those same restrictions may not necessarily apply to the city employee.

Q. What is the advantage or disadvantage, and who feels it? A. In this particular case, the majority of the city people feel that it is an advantage to them not to merge with the road drivers because if they became disabled or disqualified they could bring back into the city seniority that they never enjoyed in the city before.

Q. By "they" you mean road drivers? A. Yes.

[189] Q. Are there other advantages or disadvantages that the employees feel in your experience? A. A great many of the employers in the Southern Conference——

Q. Well, I'm talking about the employees at this point. A. Yes, sir. A great many of the employers road drivers are covered by what is known as the Modified System Seniority. This would mean that if a driver is laid off in one local, and we will use East Texas as an example, if he was laid off for lack of work in Memphis, Tennessee, he could take his seniority and move to Dallas, Texas and dove-tail into the board. [sic] If he had a combined seniority roster, city-

there is a trucking company in Memphis, Tennessee named Mid-South, or Southern Forwarding, I'm giving you the wrong name. Southern Forwarding Trucking Company that is approximately 50-50, [191] 50 black and 50 white.

Q. What about Roadway Express? A. Roadway Express today has some minority people. I do not know the exact nature. Meridan, Mississippi has eight or nine out of approximately 100 drivers, but I do not know their overall system balance.

Q. Do you know what the balance is in the Southern Conference? A. No, I do not.

Q. How about Yellow Freight? A. No, I do not know the number.

Q. You would testify to the fact that a great majority of the individuals that drive as line drivers are Anglo or white, would you not? A. I would say that the majority are Anglo.

Q. Would you also agree with me that most of your so-called minority employees have been hired from the last two or three years? A. I would believe that to be true, yes, sir.

Q. And prior to that time, there were virtually none or no minority employees employed by these freight companies that we have been discussing, is that correct? A. The word "none" I would disagree with. There were very few employees.

Q. And you knew that? [192] A. Did I know it then?

Q. Yes. A. Yes, I knew it then.

Q. You knew it when you participated in the various negotiating sessions that took place in the formulation of the contracts that are presently in existence, the Southern Conference Supplemental Agreement? A. I knew on the basis of an overall picture in the Southern Conference that there was not a large number of minority people employed as road drivers. As far as the individual employer, individual location such as San Antonio or Dallas, my knowledge would not cover that.

Q. Let me ask you this: Did the thought ever cross your own mind that one of the reasons that contributed to the exclusion or the very small number of minorities as road drivers was the fact that you had a separate seniority roster? A. No, the opposite is true. Having been a road driver since 1948 and having participated as a member all these years, I know why there was no or a limited number of minority people in some places.

Q. And what was the reason? A. The primary reason is the people never made application for the job.

Q. That's because they knew they wouldn't be hired, isn't that correct? [193] A. No.

Q. I believe your testimony is that you participated in the last session and also that you participated in the negotiations with reference to the city driver supplemental agreement and also the road driver agreement, is that correct? A. Yes, sir.

Q. Were you familiar at that time that several law suits had been filed against various trucking companies concerning dual lines of seniority? A. At the time of the negotiations in 1969?

Q. Yes. A. No. I did not have knowledge of individual law suits against individual employer units.

Q. You weren't familiar with the fact that there was a law suit pending against East Texas Motor Freight in Memphis, Tennessee? A. No.

Q. Or against Roadway? A. I knew that there was litigation against Roadway and the Teamsters.

Q. That's one case. Are there any other cases that you can remember? A. That is the only case. And the way I had knowledge of that is because there was some discussion during contract negotiations in Washington, D. C. between the parties.

[194] Q. And that law suit was filed by the United States Government, was it not? A. I believe that to be true. I'm not sure.

Q. Let me ask you this: Did the thought ever cross your own mind that one of the reasons that contributed to the exclusion or the very small number of minorities as road drivers was the fact that you had a separate seniority roster? A. No, the opposite is true. Having been a road driver since 1948 and having participated as a member all these years, I know why there was no or a limited number of minority people in some places.

Q. And what was the reason? A. The primary reason is the people never made application for the job.

Q. That's because they knew they wouldn't be hired, isn't that correct? [193] A. No.

Q. I believe your testimony is that you participated in the last session and also that you participated in the negotiations with reference to the city driver supplemental agreement and also the road driver agreement, is that correct? A. Yes, sir.

Q. Were you familiar at that time that several law suits had been filed against various trucking companies concerning dual lines of seniority? A. At the time of the negotiations in 1969?

Q. Yes. A. No. I did not have knowledge of individual law suits against individual employer units.

Q. You weren't familiar with the fact that there was a law suit pending against East Texas Motor Freight in Memphis, Tennessee? A. No.

Q. Or against Roadway? A. I knew that there was litigation against Roadway and the Teamsters.

Q. That's one case. Are there any other cases that you can remember? A. That is the only case. And the way I had knowledge of that is because there was some discussion during contract negotiations in Washington, D. C. between the parties.

[194] Q. And that law suit was filed by the United States Government, was it not? A. I believe that to be true. I'm not sure.

Q. There was some consideration then at the international level concerning the dual line seniority or the separate roster? A. In regard to Roadway?

Q. Well, with regard to the company. With regard to the Teamsters contract. A. I would like for you to ask the question again. I do not believe I understand it.

Q. I believe you testified that there was some discussion in Washington, amongst the Teamsters concerning the Roadway case, is that correct? A. Yes, but not in regards to the contract itself. There was some discussion between employees and the International Brotherhood of Teamsters concerning the Roadway case as a law suit.

Q. Was there a consideration at that time that the courts might order a merger of the dual lines of seniority? A. I wouldn't have any knowledge of what the other people thought might or might not happen. We are constantly conscious of that thought today that the courts might someday order that to happen.

Q. Let me ask you this: Did anybody say anything to you concerning the fact that the courts might order a merger of [195] the seniority rosters? A. No, sir.

Q. And you didn't mention it to anybody? A. Not in the vein that you described it.

Q. What vein was it then? A. I would say that there was a discussion between me and the business agents that someday the court may order a total dove-tailing of both city, office, shop and road employees.

Q. As the person having the responsibility for that in the Teamsters Union, have you consistent with that made any proposals for the upcoming negotiations or the upcoming contract to consider the possibility of merging the seniorities? A. In the first place, I do not have the right or the authority to make a proposal. That proposal must come from the membership.

Q. Are you still President of the Local in Jacksonville? A. No, I resigned in 1970 to devote full time to the job I presently have.

Q. Do you feel it incumbent upon yourself based upon the non-discrimination policy of the contract to mention on a personal basis to Mr. Fitzsimmons or any other representative of the Teamsters that single seniority be considered for the next contract? A. If that occasion came about, it would be my recommendation that separate seniority lists be maintained.

[196] Q. You testified, I believe, in the prior cases that separate seniority lines are more efficient, or the converse, that the single seniority roster would be inefficient. To your own knowledge, are there any truck lines or freight lines that operate with the single seniority roster? A. Well, when you say truck lines, truck lines can vary from local cartage to a trans-continental carrier such as Roadway, Consolidated.

Q. Well, any employer that has a contract with the Teamsters that operate a trucking operation, are there any such units that have a single seniority roster for road and city drivers? A. There are some truck lines, and again, you are covering from local cartage to trans-continental carriers. I know of no large common carier, over the road operation, that has singular seniority or common seniority, road seniority.

Q. With reference to those companies that do have a merged seniority, have you had any discussion with any of the employers to determine whether or not their present system is efficient or inefficient? A. I have not.

Q. So, you can't testify then that the merged seniority in those cases has led to an inefficiency in the business, can you? A. You say the ones that do have——

[197] Q. Yes. A. My answer would be no.

Q. I believe you also testified that the Teamsters were responsible for lobbying and for the creation of the passage of Title 7 of the 1964 Civil Rights Act, is that correct? A. Yes, sir.

Q. Are you familiar with that particular act? A. Only on its face. Not as an attorney. Not as an attorney, I'm not familiar with it.

Q. Let me ask you this question: Do you know whether or not an individual's civil rights, and this is a civil rights case, can be deprived by a vote of a certain number of people?

MR. BAAB: I object to the question. It calls for a legal conclusion.

THE COURT: I believe he said he wasn't a lawyer. That would be a legal conclusion. I will sustain the objection.

Q. (By Mr. Heidelberg:) I believe you testified that there is a modified system of seniority for road drivers, is that correct? A. There is more than one type of seniority for road drivers. The modified system is one of them. Yes.

Q. Are you familiar with what type of system East Texas Motor Freight employees? A. East Texas Motor Freight is a modified system.

Q. Which means that a driver from Memphis can come in [198] assume he is laid off in Memphis, and bump a driver with a lesser seniority than a road driver in Dallas, is that correct? A. The instance that you have described, if he was properly laid off in Memphis, he would have a right to exercise his modified system on a younger driver within the system.

Q. So, you do have a system within the Southern Conference with East Texas Motor Freight where you have drivers quite possibly shifting from one domicile to another? A. The answer is yes. And this shift comes quite often due to highway changes, equipment changes, route changes.

Q. Have you ever had any negotiations with the company where the company has brought up the fact that they are displeased with the modified seniority road system and wanted to have it removed from the contract? A. No employer to my knowledge likes the modified system. They would constantly like to have it removed from the contract.

Q. So, it was upon the insistence of the Teamsters that we have the modified road seniority system, is that correct? A. I would say that is true, sir. When you say the Team-

sters, you have reference to the Teamsters membership covered by the contract.

Q. If that's the case, why didn't the teamsters try to do the same thing for the city drivers? A. The city drivers have an entirely different set of [199] circumstances governing whether they work or they do not work. And I'll give you two examples. San Antonio, Texas with the East Texas Motor Freight, what determines how many people work for East Texas in the city is determined by the amount of business that they have in San Antonio, how much freight comes to San Antonio, how much freight leaves San Antonio and how much is broken across the dock, and "broken" is the word meaning unloaded.

A road driver seniority is determined by many other factors than business. For an example, a new road is built between Dallas and Jackson, Mississippi. It now permits road drivers to run from Dallas to Jackson without stopping or breaking. In the past, road drivers would run part of the way from Dallas to Jackson such as Shreveport, go to bed and another driver would go from Shreveport to Jackson.

As the interstates improved, as the highway system improves, it made it necessary for road drivers to be redomiciled. If they were covered by terminal seniority, that man who had previously been employed in Shreveport, Louisiana could have been laid off under the language of the contract and the Dallas driver run over, ahead or by him from Dallas to Jackson, Mississippi. With the modified system, this gives him protection outside of the 25-mile area or 50-mile area as is described in the contract.

Q. And the city drivers of course are not afforded the same protection because if they are laid off in San Antonio, [200] they can't go to Dallas or anywhere else. A. Well, again, the theory here is that the man in Shreveport, Louisiana, his work has been taken away from him by no circumstances which he has control of. New equipment, new authority, new highway.

Q. Well, isn't that true also of the city driver when there is not enough freight for him to handle and he is laid off? A. You give two different descriptions. The description I gave was that the business that the man in Shereveport formerly performed is now still being performed by a man out of Dallas running from Dallas to Jackson direct. If, in case of the San Antonio man, if he is laid off for lack of work, no one would be performing the work that he formerly performed in San Antonio. The business would no longer be here. The business condition controls whether he works or does not work under terminal seniority.

Q. Under the modified plan, the road driver if he was laid off, didn't have work, he could transfer someplace else, could he not, regardless of whether his work was replaced as you said, by a driver from Dallas? A. Under the question that you posed, if a road driver is properly laid off, he can go and bump a junior man. A proper lay-off means this, that there is no work there for him available. If there is work there, he cannot go to another [201] town and bump another man.

Q. Let me ask you this: I believe you testified in response to a question by counsel that the proper line of seniority provides for mutual protection of both city and road driver, is that correct? A. In my opinion, yes.

Q. Let me ask you this: Doesn't the fact that you have separate lines of seniority also provide for mutual exclusion of city drivers and road drivers? A. Seclusion?

Q. Exclusion. A. Exclusion?

Q. Yes. A. You mean from moving freely from one unit to another?

Q. Yes. A. The answer is yes.

MR. HEIDELBERG: Thank you.

REDIRECT EXAMINATION

BY MR. BAAB:

Q. Mr. Smith, have the city employees covered in the Southern Conference area by the National Master Freight

Agreement and applicable supplements ever to your knowledge proposed that they have a modified seniority rather than terminal seniority? [202] A. To my knowledge, there has been no proposal for an overall general request for a merger under the modified system of the city people's seniority. There are a few very small instances where you will have two terminals with common rosters. That's where they are located say 35 miles apart and they operate under a common roster.

Q. That's provided for under the contract, is that right? A. Yes, sir.

Q. Now, counsel on cross asked you why—he was asking you about the fact that according to your testimony few minority group people had applied for road driving jobs in the past. Why is that, in your opinion? A. Well, we are going back now to the 50s, and I'm going to give you my personal knowledge of where I worked and the conditions I worked under.

Q. All right. A. In Jackson, Mississippi if a black man applied for a road drivers job in 1950, 55, 57, he would experience extreme difficulty in even finding a place to eat, a place to sleep away from home. Therefore, black people did not ask for the jobs in 1948 and 1950 and 1955 because it was an insult to their dignity to be dispatched from say Jackson, Mississippi to St. Louis, Missouri and be denied a place to eat or sleep enroute. And in my opinion, they preferred the city jobs and they requested the city jobs and they predominantly made a demand for the city [203] jobs. The public accommodations act was not available for them in those years.

MR. BAAB: Thank you.

THE COURT: May this witness be excused, [sic] Gentlemen?

MR. HEIDELBERG: Your Honor, I have just one more question.

RECROSS EXAMINATION

BY MR. HEIDELBERG:

Q. Mr. Smith, when you participated on the negotiating committees, you were a delegate for the Southern Conference of Teamsters, and that is reflected in the contract, is it not? A. No. I am an employee of the International Union and I am assigned to the Southern Conference. And when I participated in the contract negotiations, and I assume you are talking about 1970-1973?

Q. Yes, I am. A. I participated on the basis that I was assigned that job by the International Union of the Southern Conference.

Q. I probably misled you, but at the rear end of that contract there is a line that says Southern Conference of Teamsters, and your name appears on that list, does it not? A. Yes, I am a member within the Southern Conference of Teamsters, and I was assigned to that particular contract.

Q. So, you were representing or working as an agent for [204] the Southern Conference of Teamsters? A. No.

MR. HEIDELBERG: I pass the witness.

MR. BAAB: That's all the questions I have.

THE COURT: May Mr. Smith be excused? I believe that this will conclude his testimony, gentlemen?

MR. BAAB: Yes.

THE COURT: Mr. Smith, thank you very much. You are excused. Mr. Weiss, I presume you wish to resume the presenting of your testimony. You may proceed.

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Testimony of Ezra Bierle

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DIRECT EXAMINATION

BY MR. WEISS

[216] Q. During the period from 1970 through the time that Mr. Perez was discharged, was he or was he not a sat-

isfactory employee? A. Mr. Perez had the ability of being a good employee when he wanted to be. He could do the job if he wanted to.

MR. HEIDELBERG: Your Honor, I move that answer be stricken as not being responsive to the question.

THE COURT: I will overrule the objection.

Q. (By Mr. Weiss:) Did he do a satisfactory job from 1970 to the time he was fired in 1971? A. No, sir.

Q. Did Mr. Jesse Rodriguez do a satisfactory job during that, we will say from 1970 down to the present time? A. No, sir.

Q. Did the Scobey people indicate to you or Mr. Asbury that they thought Mr. Perez was intentionally mixing up these boxes? A. Yes, they did.

Q. Did you receive calls from customers asking that you not send Mr. Perez to pickup or deliver anything from them? A. Yes, sir, we did.

Q. About how many customers during the period from 1970 through the time he was fired? [217] A. I don't know the exact number, but there were numerous ones.

Q. Those that called you, what sort of complaints did they make? A. That he was being very discourteous to them.

Q. Do these city drivers have any function as salesmen? A. Oh, definitely. Your city driver is considered a salesman as well as a driver.

Q. Explain that to the court. A. If you have a driver who can meet the public very diplomatically and be liked by his customers, he will get more business for us. But if a driver is discourteous to the customers, he doesn't treat them right, he can run off more business than a half dozen salesmen can get back.

Q. Was Mr. Perez that type of driver? A. Yes, sir.

Q. The latter type? A. Yes, sir.

Q. Did you have trouble with Mr. Modesto Herrera of the same kind? A. Yes, we did.

Q. Did any customers call in and say not to send him back? A. Yes, sir, they did.

Q. The same sort of complaint as Mr. Perez? [218] A. Yes, sir.

Q. About how many runs to Lackland do you have a week? A. Approximately three.

Q. And to Randolph, how often do you have to make a run out there? A. We go out there once or twice a week. These are normally bob-tail runs.

Q. As a supervisor at the San Antonio Terminal or as a supervisor at East Texas Terminal, do you have any norms or rules of thumb as to how much freight a city driver is supposed to handle an hour? A. Yes, sir, we have a production quota which we have to meet, and in order to meet this quota we have to have certain production out of the people that we have.

Q. What are those norms or quotas or whatever you want to call them? A. In order to make our dock production we have to unload and load approximately 5,000 pounds per man hour. Our city pickup and delivery quota now is 1650. And our volumn [sic] production which is shipments over 10,000 pounds, our quote is 5,450.

Q. During the last two or two-and-a-half years, has Mr. Herrera made the proper production? A. No, he has not.

Q. How much has he failed, how far has he fallen short? [219] A. He has fallen about, I would say 25 to 30 percent short.

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CROSS EXAMINATION

BY MR. HEIDELBERG

[220] Q. You testified that two or three city drivers made inquiries of you regarding the obtaining of road drivers jobs. Who were those drivers, if you can remember? A. The only one that I know, that I can recall was Trinidad Gomez, that I can recall off-hand.

Q. I believe you testified that there were two or three. Who were the other ones? A. I think they were Mr. Herrera and Andrew Hernandez.

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Q. Your testimony is that three individuals that you can recall came to you and asked you about road driver jobs. When did each of those individuals come and speak to you about the matter? A. Sir, I don't know the dates.

Q. Well, do you recall the year? Was it in 1971? A. I think it was probably in 1970. I really don't recall.

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[230] MR. SEAY: Call Mr. Johnson.

[231] IN THE UNITED STATES COURT FOR
THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO, TEXAS

(Caption Omitted in Printing)

H. L. Johnson

called as a witness, was duly sworn, and testified as follows:

DIRECT EXAMINATION

BY MR. SEAY:

Q. Mr. Johnson, would you state your name to the Court. A. H. L. Johnson.

Q. Where do you live? A. Dallas, Texas.

Q. And by whom are you employed? A. East Texas Motor Freight Lines.

Q. In what capacity, Mr. Johnson? A. I am president of the company.

Q. How long have you been president, sir? A. Going on the third year.

Q. When did you come with the East Texas Motor Freight Company? [232] A. 1953.

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Q. Would you please detail briefly for the Court when you were associated with the trucking business and what that experience was, very briefly. [233] A. I became employed in the motor freight industry on July 11, 1935 at Shreveport, Louisiana with the Southwestern Transportation Company as a dock worker. I worked as a dock worker for

a number of months and became a city driver. Drove in the city. And subsequently I became a road driver, drove on the road for a period of time. Later became a checker on the dock, an OS&D Clerk, did office work, became a supervisor and then became assistant terminal manager prior to World War II.

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[234] Q. I would like for you to please state where they operated at that time. A. Generally speaking when I came with the company until 1965, East Texas operated from the Midwest area, namely the Chicago-St. Louis area, Memphis, Tennessee on the east of Texas and Louisiana, and parts of Arkansas.

Q. All right. Was that also their area in the '40's? Do you remember where their operations extended in the '40's? A. My knowledge of East Texas prior to my association with them was a result of being in direct competition with other employers. They operated primarily as a Texas carrier from the beginning up until sometime in the latter '30's, expanded into Arkansas, into Memphis, Tennessee, St. Louis, Missouri and subsequently into Chicago, Illinois about 1940.

Q. All right. Now then, subsequent to your coming with the company, were they granted additional authority by the ICC, additional operating authority. And if so, please tell the expansion of the company. A. In 1965 we acquired the operating authority from Atlanta, Georgia and Birmingham, Alabama on the one end to [235] Memphis, Tennessee, which was a part of formerly the Hoover Motor Freight Express.

Q. All right. Now, what geographical area did that cover in the east? A. That covered Atlanta, Georgia, specifically, and Birmingham, Alabama specifically.

Q. When was the next authority into another section of the country? A. The next acquisition was made under contract with the Lee-American Freight System, which is a small midwest carrier, headquartered in St. Louis, Mis-

souri, which operated in the States of Illinois, St. Louis, Missouri, down to Memphis, Tennessee, Michigan and parts of Indiana.

Q. Then when was your next expansion? A. The next expansion was Lee-American. East Texas Motor Freight Lines was given temporary authority by the Interstate Commerce Commission for management control on October 10, 1967. Subsequent to that, East Texas Motor Freight Lines made an acquisition of Consolidated Copper State Lines, Inc. of Los Angeles, California, better known by the trade name as Valley Copper States, and gained management control through the temporary authority from the Commission, that's the Interstate Commerce Commission, on October 20, 1969.

Q. And was the ETMF and the Valley Copper State sub- [236] sequently merged into one company? A. They were merged legally and formally in December, 1970, as well as Lee-American was merged legally and formally in September, 1970.

Q. And did that merger accomplish your routes to the West Coast? A. It did.

Q. All right. And how many states do you now operate? A. We operate in 19 states with 52 terminals.

Q. All right. Now, Mr. Johnson, as president of the company, are you cognizant of the importance of safety in the operations of an over-the-road carrier? A. Yes, sir.

Q. What effect does the company's safety record—why is that important? What effect does that have and why is it important? Would you state the reasons? A. To retain your operating authority on the criteria of the Interstate Commerce Commission has two primary requisites, a good safety record for fitness, which they have referred to as fitness; the other is what I would call ability, and that's financial ability, or stability to maintain such operations in the economic structure of the transportation industry.

Q. Now, in the 1950's, the record before the Court, a deposition which has been introduced in evidence by the [237]

Plaintiff as Plaintiff's Exhibit 33 of Mr. Harold P. White——

MR. HEIDELBERG: Your Honor, excuse me. I talked to Mrs. Marley, and there is a confusion on the exhibit numbers. That has been changed to 28. The record will reflect that.

THE COURT: Now, let me be sure that I have my record of the exhibits. It is Exhibit Number 28?

MR. HEIDELBERG: Your Honor, Exhibit Number 28 were the the exhibits that were attached to that particular deposition. And Exhibit Number 33 which was misnomered, misnumbered, was the deposition itself. So for convenience sake, we merged the two into Exhibit number 28.

THE COURT: All of the exhibits and the deposition itself are now known as Exhibit Number 28?

MR. HEIDELBERG: Yes, Your Honor.

Q. (By Mr. Seay:) I was referring to page 14, line 15, and page 15, lines 9 to 14. In that deposition that has been introduced into evidence and as was brought out by Mr. Heidelberg, that in that period of time, around 1953, the company was having some difficulties in maintaining appropriate safety standards with the equipment they had, and also there's a reference to difficulties with the Government contract that ETMF had for carrying explosives. And I want to know if you became aware—were you familiar with those difficulties after you came with the company? [238] A. I was made aware of it. Yes, sir.

Q. All right. Would you state what those difficulties were? A. I was advised by Mr. Marvin Blakney who was vice president of the company at that time, and still an officer of the company, that the safety record of East Texas Motor Freight Lines sometime in the early, early '50's was in a bad condition and that he had been advised by the Interstate Commerce Commission as an officer of the company

that the safety record must be improved. The accident frequency must be reduced. I was also advised by Mr. Blakney that the insurance carrier was carrying East Texas's PI & PD coverage during those years had cancelled the insurance coverage. Subsequently, two of the owners, as told to me by Mr. Blakney, made a tour of the system, talking to the road drivers and other employees, advising them that the safety record had to be improved immediately because the insurance had been cancelled, and they were out seeking insurance companies who would extend such coverage which is required by the Interstate Commerce Commission.

And that also Mr. Blakney advised that during that period, that East Texas Motor Freight Lines had been taken off the approved list, and I do not know the period of time, of the handling of Class A and B explosives.

Q. For the Department of Transportation of the ICC? [239] A. Of the ICC. Yes, sir.

Q. Now, I want to pin down the time. That was prior, some time prior to your coming with the company? A. Yes, sir.

Q. All right. Now, who was the safety director at the time you came with the company, Mr. Johnson? A. A gentleman by the name of A. J. Harriman.

Q. And was he at any time replaced in the '50's? A. Shortly after January 1, 1954, Mr. Harriman was replaced by a gentleman named Mr. Pete Mondics as the director of safety for the company.

Q. And how long did Mr. Mondics stay with the company as director of safety? A. Mr. Mondics was with the company until approximately August 1957.

Q. Who came in then? A. When Mr. R. W. Huffman was employed as director of safety.

Q. Is Mr. Huffman in the court room? A. Yes, sir.

Q. Incidently, you mentioned Mr. Blakney, where is he now? A. Mr. Blakney is senior vice president and administrator for the company, and presently he is ill and not able to be on duty.

[240] Q. In other words, he's been in the hospital and confined to his home? A. Confined to his home due to illness.

Q. All right, thank you. Now, Mr. Johnson, were you familiar with the qualifications for road drivers back there in the '50's at the time that Mondics was—generally familiar with them at the time Mr. Mondics was director of safety? A. Yes, sir.

Q. And after Mr. Huffman came, do you know whether any changes were made? I'm not asking you what changes were made, I'll cover that with Mr. Huffman, I'm just asking you whether any changes were made after Mr. Huffman—— A. Yes. The qualifications were greatly improved after Mr. Huffman came in.

Q. What was the company stressing in the '50's there when Mr. Mondics was there, in view of your adverse history on the safety record. A. The company appointed me general manager on January 1, 1954. And he was instructed along with me as superintendent of terminals which encompassed the field operations that the safety record of the East Texas Motor Freight Lines had to be improved drastically, that the company did not want to find it's certificate in jeopardy again. So this was of primary concern not only as a policy, but as a day-to- [241] day activity. And this caused us to seek out a man who had the qualifications to help improve that safety record. Mr. Mondics' primary responsibility was—of course, he had the over-all responsibility of safety, but his primary was to institute improved safety habits among road drivers in all categories.

Q. During that period of the '50's, were you primarily seeking to improve the quality of the road drivers that you then had employed, or were you in the business of actively seeking and hiring people at that time? A. We were more involved in training and re-training, I should say say, the road drivers that we had to get them to understand the severity of the accident problem and the safety needs, to up-grade them by more training. This included in-cab training plus safety meetings and well-defined safety programs.

Q. Now, did you have a qualification with respect to, at that time, under Mr. Mondics, with respect to previous over-the-road driving experience? A. Yes. Generally speaking, we were looking for new hires with a minimum of two years' experience.

Q. If you went into hiring? A. If we went into hiring. Yes, sir.

Q. And did you have at that time an age qualification? A. Generally we tried to, on the minimum side, keep it [242] to a minimum of 27 years. We preferred a little older type of individual.

Q. All right. Now, at this time——

MR. SEAY: May I approach the witness, Your Honor?

THE COURT: Yes, you may.

Q. (By Mr. Seay:) I hand you what has been marked in the record as Plaintiff's Exhibit 31. Do you recognize that exhibit, Mr. Johnson? A. Yes.

Q. To whom is it addressed? A. It is addressed to all terminal managers.

Q. And who is the signatory there? A. Myself, H. L. Johnson.

Q. I believe you stated you were superintendent of terminals at that time? A. That's correct.

Q. Would you please read that to the Court. A. "For your information and guidance, the following is a new company policy effective at once. No regularly employed city employee will be transferred to a position as road driver for East Texas Motor Freight Lines, Inc. at any terminal. This action is taken in the interest of regular city employees who have already established city seniority. With family responsibilities, the company feels it is in the best interest of the regular city employee to remain on city status rather than [243] give up such seniority to try to make a living for his family on the bottom of the road driver's seniority board. Please handle accordingly."

Q. Now, were you in on the decision to establish the no-transfer rule? A. I was.

Q. And were there any additional reasons at that time? A. Yes.

Q. Would you please state to the Court what those additional reasons were, please sir. A. Other reasons were, the city driver is a very important part of our business. He is a driver-salesman and we need him. And in the building of the East Texas Motor Freight Lines, we need the city driver's ability as a salesman to call on the shipping public to get more business for our company so that we could grow.

Additionally in the interest of safety, the city driver's type of operation is such that he is familiar with city routes, back streets, short routes, how to get to shipper's places, as compared to road drivers who operate under different conditions entirely.

Q. Is the city driver driving ordinarily in daylight hours? A. It is primarily in daylight hours. Yes, sir.

Q. How about the road drivers? [244] A. Road drivers drive all hours, but principally at night, a great majority.

Q. Do they encounter in your system various grades, that is, hills and—— A. Road drivers encounter all types of terrain, whether it be in flat-land country, you have rolling hills, you have blind hills, as compared to mountains, you have mountainous terrain, where you have sea-side terrain. You have weather elements that might not be prevalent when he leaves on his run, but 400 miles away he could run into ice, snow, sleet, and this is a constant thing.

Q. Does he have any direct supervision when he's out there by himself on the road? A. A road driver is the least supervised individual in the motor freight industry.

Q. How about the city driver when he has some problem right here in the area of the city, what can he do? A. The city driver has the ability either through two-way mobile radio communications in our case and most cases, telephones to make constant contact with his terminal, his ter-

minal supervisor for instructions if he runs up against a problem he can't handle.

Q. What are the present qualifications with respect to immediately preceding over-the-road driving experience for the hiring of a new road driver of your company? [245] A. Our present qualifications are three years prior experience. That's one of the prime requisites.

Q. Does that mean immediately preceding? A. Immediately preceding. Yes.

Q. All right. About when was that put in? I know you don't know the date, but about when was that established? A. Approximately the beginning of 1958 or thereabouts.

Q. After Mr. Huffman came with the company? A. After Mr. Huffman.

Q. Do you feel that that is an important qualification to the safety record of the company? A. Most certainly.

Q. Why do you feel that way? A. Because the nature of the city driver's responsibility is one where he has familiar surroundings at all times, and the general, what we call commercial zone area of the city in which he operates. He can operate in many sections, but as a rule, he learns the city and he has familiarity with the streets, traffic conditions, weather conditions, zoning ordinances, shippers' facilities and things of this nature. Contrariwise, the road driver, driving some in day time, some at night, in the fog, icy bridges, he must be able to adjust to all of these conditions at all times.

Q. Now, referring to your exhibit there that you have in your hand, Plaintiff's Exhibit 31, to your knowledge, did [246] national origin have anything to do with the adoption of that rule? A. None whatsoever.

Q. Did a man's race have anything to do with it? A. None whatsoever.

Q. Or his color? A. None whatsoever.

Q. Now, Mr. Johnson, your Valley Copper State, I call it an amalgamation or a merger that took place in December 1970—First, I'm going to ask you if East Texas Motor

Freight prior to the amalgamation, had they had any road drivers in San Antonio, domiciled here? A. No, sir.

Q. Now when the Valley Copper State, when you took them over, did they have any road drivers domiciled in San Antonio? A. I believe I'm correct in saying that Valley Copper State System had one road driver domiciled in San Antonio.

Q. What was done with that one road driver after the amalgamation? A. After that time, it was determined that this road driver was not needed in San Antonio, because San Antonio does not fit the——

Q. Wait a minute. He was not needed. So he was transferred out? [247] A. He was transferred out.

Q. Now, explain to the Court under your contracts with the Teamster's Union, when you want to have a road driver transfered from a city where road drivers are domiciled, what is necessary to do that? A. When you want to physically re-domicile road drivers under the contract we have with the Teamsters Organization, you have to prepare your change of operation, a change of operation in order to justify such a re-domicile.

Q. When you say a change of operation, before whom does that go? A. That goes before a change of operation committee comprised of the union representatives and the employer representatives. And they have to approve this change of operation before it can be put into effect.

Q. Is or is not that conducted on the basis of a hearing where you present testimony? A. Yes, it is.

Q. Do you have anybody on that joint operation committee, your company? A. No. We have no one serving on it.

Q. As I understand it, under your contract with the teamsters, that is a committee of an equal number of representatives of the union and an equal number of employers who make those decisions as to all of these companies on changes [248] of operations under the National Master Freight Agreement, is that correct? A. That's correct.

Q. Was that type of a change processed through the joint committee after the acquisition by ETMF of Valley Copper State? A. Yes.

Q. Now, I want you to give the Court the reasons why in your business judgment ETMF did not want to have road drivers domiciled at San Antonio, at the terminal there? A. San Antonio by its geographical location and by its market area is not conductive in our company to the domicile of road drivers because San Antonio is not considered in our company's jargon a head-haul terminal.

Q. When you say "head-haul"—— A. Yes, head-haul.

Q. Explain what you mean by head-haul. A. Head-haul means where you, what we call, originate a great amount of business that is a requisite for domiciling drivers at that particular place. Nor is San Antonio geographically located in the scheme of our business and our company for a relay-type operation where you have drivers that bring loads in and go to bed, and other drivers take them to another relay point.

Q. That is picking the trailer up, or pick the rig up and [249] go on with it? A. That's correct.

Q. I believe that under these motor carrier safety regulations that the road driver can only operate so many hours at a time, and then he has to have a period of rest, does he not? A. That's correct.

Q. The line drivers that do come into San Antonio, what do they do when they come in here? A. Two things. If they have come from a far distance within the scope of the ten-hour driving allowed by the Commission, they go to bed for rest. They may come in on a dispatch and make a turn through San Antonio back to some other destination.

Q. Is or is not it important to the company to have an operation where you don't have vacant back-hauls, or where you can have a smooth operation across your routes? A. Will you restate that question?

Q. What I'm asking there is, is there always, when a man comes into San Antonio, is there always a back-haul for him? A. Not necessarily.

Q. Now, if a terminal where you have both road drivers and city drivers—incidentally, what terminals do you have those people domiciled at? A. Which group?

[250] Q. Road and city both, where you have them both. In Texas. A. In Texas?

Q. Yes. A. We have road drivers domiciled in Dallas, Texas, Pecos, Texas and Longview, Texas.

Q. Do you also have city drivers there? A. We do not have city drivers in Pecos, Texas. No. We have city drivers in Dallas and Longview. Pecos is considered a relay point, which is a terminied [sic] point to which road drivers operate out of Dallas. And that's as far as they can go safely, and they go to bed and rest, and other drivers take the runs on further west.

Q. All right. And these runs then from the Great Lakes, that come down to these main terminals in Texas where you have your road drivers, and they can go west or east? A. That's correct.

Q. Do you operate south of San Antonio? A. South of San Antonio?

Q. Yes. I mean south or southwest. Do you have any operating authority south of San Antonio? A. No.

Q. In other words, this would be an end-of-the line terminal then? A. Right.

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[258] Q. You testified that the present road driver qualifications were instituted in 1958 by Mr. Huffman. And one of the qualifications was the fact that a person needs to have three years immediate prior road experience to become a road driver, is that correct? A. Approximately in 1958. Yes, sir.

Q. Now, a recent exception has been made to that policy, has it not? A. A recent exception?

Q. Yes. A. Would you qualify what you mean, sir.

Q. Okay. I'm referring specifically to the adoption in January 1972 of the modified no-transfer system. Has an exception been made based upon that policy pertaining to the

three years immediate prior road driving experience? A. I would like to answer the question this way, sir: In the early part of 1972, the no-transfer rule was modified temporarily to accommodate the transfer at terminals where we have domiciled road drivers, to accommodate the transfer of [259] some city drivers to the road who indicated a desire to become road drivers provided they met the qualifications.

Q. Is it not true, Mr. Johnson, that in determining whether or not a person had road-driving experience, that is, experience as a tractor-trailer driver in the city, was to be considered as recognizable, equivalent experience? A. I'm sorry, sir, I don't understand the question specifically.

Q. Those people who transfer from the city to the road obviously have not been driving on the road. Now, is it not true that the company allowed them to use their city tractor-trailer driving experience as equivalent to the three years immediate prior road experience? A. I think that would be the case. Other witnesses are more qualified to that than I am, sir.

Q. And this policy was initiated and applied to individuals who were city drivers domiciled in terminals that domicile both city and road drivers, is that correct? A. Yes, sir.

Q. And that would include Dallas? A. That would include Dallas.

Q. Let me ask you this, Mr. Johnson: The no-transfer policy, in your opinion would it have the effect of maintaining the city drivers in city driving positions? I will repeat the question if it is not clear. [260] A. Well, I need to ask a question if I may, sir. Are you talking about prior to the temporary period we modified to allow entry and then we closed it? Are you talking about——

Q. I'm talking about those terminals like San Antonio that domicile only city drivers. The no-transfer policy has always had the effect of maintaining them in the city, has

it not? A. In San Antonio we have no domiciled road drivers. So it wouldn't affect them, sir.

Q. My question is, Mr. Johnson, a city driver in San Antonio or any other city driver domiciled, under company policy he could not transfer to road positions, is that correct? A. Under the original policy, that's correct.

Q. And do you know of your own personal knowledge that East Texas Motor Freight employs several, perhaps in excess of 100 black and Mexican-American city drivers in the State of Texas? A. I'd say at least that many.

Q. And how many, would you say, blacks and Mexican-Americans were employed on the road? A. I wouldn't attempt to guess. The personnel department would have those figures.

Q. Would it be fair to say then that the black and Mexican-American city drivers who are employed in the State of [261] Texas then are dead-locked into those positions? A. I wouldn't necessarily agree with that. I have already explained that wherever there are line drivers domiciled such as Dallas, we open it up for transfer to city drivers.

Q. Without taking their seniority with them? They have lost their seniority for job bidding and lay-off purposes, have they not? A. Under our policy modification, under the modification of the policy they had to meet those conditions of seniority.

Q. And what was the reason for that? A. The reason for what, sir?

Q. The reason for the loss of the seniority for job bidding and lay-off purposes. Was it because of the contract that exists between the company and the teamsters? A. May I explain this as I understand it, sir?

Q. Go ahead. A. In transferring from the city to the road at the point we have domiciled road drivers, specifically Dallas in this case, since you mentioned Dallas, it was opened up for a period of time for those city drivers who desired to try to qualify as a road driver, to transfer to the road as vacancies existed. And we gave them qualify-

ing tests. If they met those tests, and after a probationary period, they were still meeting those tests, they forfeited their city [262] seniority by failure to return to the city. They maintained it for fringe benefits. But for road seniority, they fit into the road seniority wherever that date put them when they qualified.

Q. My question is, did the collective bargaining agreement have anything at all to do with the fact that these individuals lost their seniority for job bidding and lay-off purposes when they went over into the road-driving categoary? A. Under the terms and conditions of the contract, the company has no right to upset the seniority. The company cannot just deliberately disturb a man's seniority. He has to follow the terms of the contract on seniority.

Q. The contract had great effect upon that decision not to allow them to take their seniority with them? A. Well, since we are obligated to comply with the terms of the contract in that regard, I would have to say yes. We had to be consistent.

Q. Has the company given any consideration to rescinding the modified no-transfer policy? A. No, sir.

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EXAMINATION

BY THE COURT:

Q. Mr. Johnson, when people have transferred from the city to the road, have any Mexican-Americans done this, or any [263] blacks? A. Yes, sir.

Q. And they have had to give up their seniority, is that right? A. Your Honor, if they——

Q. Not your company seniority, but the seniority to bid jobs and that sort of thing, they give that up, don't they, and they have to start at the bottom. Now, do Anglos have to do the same thing? Are they treated just exactly like the Mexican-Americans? A. They are treated all alike, Your Honor.

Q. And you have had people transfer, or have had drivers transfer from the city to the road, Anglos, Blacks and Mexican-Americans, is that right? A. Yes, Your Honor.

Q. And they have all had to give up the same seniority rights to do this? A. Yes, sir.

Q. Is that what you are telling the Court? A. Yes, Your Honor.

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REDIRECT EXAMINATION

BY MR. SEAY

[264] Q. All right. Now, one other question. He asked you about having more accidents in the city than on the road. I will ask you from your experience in the truck line industry what is the danger involved in a road accident with your load and in your city accident? Would you please elaborate on that. Which do you have a chance to have the more serious accident? A. It's on the road. In the city, your frequency generally speaking is great. The severity is not near as great. We have an obligation, both city and road, but on the road the severity can be real great to the traveling public. We have to have safety as the byword every time a man gets behind that wheel. He is hurtling through space if you will, at 60 miles an hour with a rig of a gross vehicle weight of 72,000 and greater depending upon what state. And if [265] he does not have that under control at all times, at the slightest problem, he can be in serious trouble. He can overturn. He can jackknife. He has to try to avoid people coming across highway stripes, center stripes, head-on collisions. It results in tremendous problems. And the worst is injury or death to either party, the employee, the driver or to the adverse vehicle, irregardless of whose fault it is. That's the first thing that has to be considered.

Secondly, then, you have cargo, which is of a tremendous value too. The cargo is not near as important as human life, either injury or death. If I might state so, sir, last Thursday at Portland, Oregon, one of our road drivers with a perfect safety record of many years was leaving on

a run from Portland down to Corning, California. On the freeway, a car forced this driver, cut in front of it, and our driver as a defensive measure took to the rail, split the railing all the way down, overturned and killed our driver instantly. Now, that's good defensive safety driving, even though we lost a life. And that's the main thing that we have to think about.

Our drivers are professional on the road, and we're going to continue to try to keep them professional. The qualifications of our company are severe, and we hope to maintain them so that we can fulfill our obligation to the public.

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[273]

Testimony of R. W. Huffman

DIRECT EXAMINATION

BY MR. SEAY

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Q. And then you came with this company in September 1957? A. Yes, sir.

Q. In what capacity? A. As director of safety.

Q. All right. Now, Mr. Huffman, when you came to East Texas Motor Freight, were you made aware of certain safety problems that had occurred in the past with respect to their safety compliance and their frequency of accidents and their safety reports? A. Yes, sir, I was made aware of it.

Q. Would you please explain to the Court when you became director of safety, if in your employment in that capacity you were given any goals? A. Yes, sir, I was given——

Q. What were they? A. Two primary goals; one was to institute whatever action I deemed necessary to insure maximum compliance with [274] the Federal Motor Carrier Safety Regulations.

And Number two was to reduce the accident frequency of this firm.

Q. All right. Now, after you came with the company, describe briefly what you did the first period of time that you were with the company. Did you make any kind of a survey? A. Well, I made quite an extensive survey of the operation and the records, what had been done and what hadn't been done. And I determined that some additional things must be done.

Q. All right. Now, as a part of your duties as safety director, did you keep track of any safety statistics? A. I did.

Q. Well, what nature? A. Well——

Q. Were they governmental or otherwise? A. That's right. National Safety Council and Governmental Statistics on safety.

Q. Was your company a member of the National Safety Council? A. Yes, sir.

Q. And they do put out certain safety statistics? A. Yes, sir.

Q. All right. Now, did you ascertain that any changes in the qualifications, did you feel that any changes in the [275] qualifications for line drivers should be made? A. Yes, sir, I did.

Q. All right. Did you decide that any changes in the safety program should be made? A. Yes sir.

Q. Would you list the changes that you made after you became safety director. A. They had three driver supervisors that were doing nothing but road patrol work. I assigned them to specific territories and designated them as district safety supervisors. They had no comprehensive in-cab training program whatsoever of in-service drivers. I put these boys in-cab, and gave these men, these drivers instruction in defensive driving and also the overall operation of the vehicles themselves.

Q. Now, you named two. Did you have any more? A. Yes, sir.

Q. List the third one. A. I instituted regular monthly employee meetings in which group instruction was given

on safety. We used every available tool, training tool, films, flipcharts——

Q. Without elaborating on that, I think the Court will want a list of what you did, and I will direct your attention to any one that I want you to elaborate on. Did you have any more? A. Yes, sir. I determined to feed the human ego by [276] a comprehensive safe driver recognition program. I instituted that.

Q. Any more? A. Yes, sir. From statistics that were available to me that I had studied for years, the younger age groups have the highest accident frequency. And as a result, I put in a minimum hiring age limit. Our target goal was 30 to 35 years of age on line drivers.

Q. Well, if you weren't able to get the 30, did you have a lower age there? A. Yes, sir, we did come down to 27 if the man had a long history that indicated his competency as a safe driver.

Q. That's number five. Would you list any more. A. Yes, sir. I determined that we needed to expand the history of line vehicle operations prior to employment by us from two years to three years. I felt that the longer period would give us a better, accurate record of the man's demonstrated history as a safe driver in line-haul operation.

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[280] Q. What ratio has your record been reduced to in respect to the 1970 average of the carriers? A. Well, the average for the other general freight carriers for the year 1970 was 2.8 accidents per million miles; whereas, ours was 1.1 accident per million miles.

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[281] Q. Has the 1971 report come out yet for the government? A. No.

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[282] Q. Would you please read the five sentences there in the first part of that report to the Court. By the way, is that made by Mr. E. K. Willis, Jr., the safety inspector of the ICC? A. Yes, sir.

Q. Please read that to the Court. A. "The last safety survey made prior to the one attached to this report was made April 24, 1952 by E. K. Willis, Jr., Safety Inspector. At the time of the inspection of April 24, 1952, it was found that carriers safety program and compliance was rapidly deteriorating. Nineteen reportable accidents had not been reported as required. Accident violations examined revealed accidents predominantly caused by poor driving, speed, carelessness and so forth on the part of the carrier's employees. An alarming increase of accidents and the severity of these accidents was experienced beginning in the latter month of 1951."

[283] Q. Now, drop down to the last sentence on the last paragraph. Just read that. On that same page. A. "In the period April 1, 1952 to November 15, 1952 the applicant has been involved in lite [sic] accidents which cost the lives of eight people and injuries to twenty-two others."

Q. Now, I'll ask you this question: Did the inspector in connection with that report—Have you seen that report before? A. Yes, sir.

Q. Did he withhold any recommendation with respect to an alternate route or authority, additional authority? A. Yes, sir; he did.

Q. That the company was seeking before the ICC? A. Yes.

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Q. I would like for you to explain to the Court in the same frequency rate as shown on that chart, the graft that has been introduced into evidence as AAAA, what the [284] frequency rate as shown by the number of line accidents reported to the ICC and the number of miles driven was on that date as found by the Government report. A. The accident frequency shown by Mr. Willis is .48 accidents. Back in those days, they related accident frequency to units of 100,000 miles. So to convert this to our present system of using one million miles, we move the decimal point over one plac. So this would thus become 4.8 accidents per million miles of operation.

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Q. Of course, actually in Mr. Willis's report, he shows the number of accidents, he shows 54 accidents in 11,142,531 miles. So on computing that, did you compute the accident frequency rate? A. Yes, sir.

Q. Per million miles? A. Yes, sir.

Q. And you came out with what? A. 4.8 per cent.

Q. Accidents—— A. Accidents per million miles.

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CROSS EXAMINATION

BY MR. HEIDELBERG

[286] Q. (By Mr. Heidelberg:) Let me ask you this, Mr. [287] Huffman: Did you have the responsibility, or do you have the responsibility for making the ultimate determination as to whether or not a person will be employed as a line driver? A. No. The final determination rests with our personnel section after they have checked out his full past employment history, Department of Motor Vehicle Records and etc.

Q. And who would be those individuals? A. Well, Mr. Robert H. Maier, vice president of training personnel.

Q. In addition to Maier, who else would be involved? A. Well, he has under him Jesse Barnes who is the Director of Personnel.

Q. Your testimony is that Mr. Maier is ultimately responsible? A. It is under his supervision. Yes, sir.

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[289] Q. During your responsibilities as safety supervisor, is it correct to state that the terminal manager did have the ultimate authority to hire, to finally hire either city or road drivers? A. The ultimate authority?

Q. Exactly. A. Well, the terminal manager could employ a man on a probationary basis subject to final approval by our personnel section after all of his employment history had been checked out.

Q. And that's true with respect to all city and road drivers employed by East Texas Motor Freight? A. That's correct.

Q. They are all cleared through the Dallas Headquarters? A. That's correct.

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[290] Q. Would you agree with me that you have very tight corporate control when it comes to this matter? A. Yes, sir.

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[291] MR. HEIDELBERG: Yes, Your Honor. I would like the record to reflect that subject to objection or correction [292] by counsel, that upon the examination of 52 road drivers who have either been employed as new road drivers or transferred from the city to the road by East Texas Motor Freight within the Southern Conference from approximately 1970 through I believe November 1972, that there were 52 such applications. And they are contained as exhibits to Plaintiff's Exhibit 18.

That of those, 12 individuals do not have a high school diploma or its equivalence which is listed as a requirement for the road driver position by the company. They are Dale Strictland, Albert Blane, Victor Williams, David Kyle, Ray S. Schmidts, Sidney Payne, Myron Greenmitchell, Lee Richmond, S. B. Davis, Roger T. Collins, Randy T. Saint and Joe C. Marris.

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[300] **Testimony of R. H. Maier**

DIRECT EXAMINATION

BY MR. RISSETTO

Q. What is your roll with regard to the company's equal employment obligations? A. I am fully responsible for its administration, setting policies in regard to that, for the affirmative action program, for all statements of policy, for the review of all of the files of the people for upgrading which ties in with the affirmative action program, the contacting of minority referral sources, the recruiting of personnel which should be minority and non-minority, contacting minority schools, close work with corporate compliance

officers from the Federal Post Office Department, daily contact with terminal management in the selection of personnel.

Q. Could you specify your work with the terminal manager. Describe it in more detail. A. Yes. Through the director of personnel that reports directly to me, we take applications when we have vacancies. [301] All of our applications are numbered so that we can keep careful count of every application that's given out when we have a job vacancy. We have certain sets of these, certain numbers assigned te the various terminals. When vacancies exist, everyone that applies for the position is allowed to complete an application for employment. When these applications are completed, it's required that the terminal manager forward those to Dallas for review to be sure that we are taking applications for vacancies that we have, to review the various race classifications or ethnic classifications, if you would like to refer to them that way, of all applicants, to make sure that we are getting a proper applicant flow, and that selections are being made on the basis of qualifications for positions.

And I review these about once a month. My personnel director, Mr. Jesse Barnes, reviews these daily as they come in. And we talk about the applications. Of those that are out of the ordinary, we review them together.

Q. Have you had any occasion to hold meetings in Dallas on the subject of equal employment? A. Yes. Each year in Dallas, we have a terminal manager or regional manager's meeting. Let's see, the first meeting was January of '71. We had the terminal manager's meeting and I had a two-hour work shop on that program. I was one of seven divisionse who handled the work shop. And this work [302] shop was devoted to the selection and upgrading of personnel and about 25 per cent of that specifically dwelt on the affirmative action program of the company and the procedure that the terminal management was to follow in that program. Then in 1972 at the general manager's meeting, we also had a similar program, and we set the divisional

goals of each division of the company, training and personnel being one of the divisions of the company. And one of the prime divisional goals at that meeting and throughout the year was increased activity on our affirmative action program for the year 1972.

MR. RISSETTO: May I approach the witness, Your Honor?

THE COURT: Yes.

THE WITNESS: I hadn't finished.

MR. RISSETTO: I'm sorry.

THE WITNESS: In 1973, last week, I just completed the regional manager's seminars which were held in San Francisco, St. Louis and Dallas. And again, we re-emphasized—I spent an hour-and-a-half on the selection process, how to recruit and how to select people on the basis of their qualifications, emphasizing the need for the affirmative action program and how to recruit minorities, specifically.

Q. (By Mr. Rissetto:) I show you what has been marked as Defendant's Exhibit EEEE. Mr. Maier, what percentage of the company's employees are classified as minorities?

[303] MR. HEIDELBERG: Your Honor, I'd like to take the witness on voir dire, if I may.

THE COURT: I'll overrule your objection. You will have him on cross examination.

MR. RISSETTO: Mr. Reporter, could you repeat the last question.

(The last question was read.)

A. As of the standard form 100 report submitted in 1972, 14.26 per cent were minorities.

Q. Of that percentage, what percentage were Mexican-Americans, sir? A. Approximately 67 per cent.

Q. And what percentage were Negro? A. Approximately 8.

Q. Has there been any change in the overall minority percentage during the last five years? A. Yes, there has

been a very significant change I feel, considering the circumstances of what has gone on in the mergers of our company. The records that I have dating back to 1966, which in 1966 I had only the East Texas Motor Freight Line as we knew it as the old company, and there were 10.29 per cent minorities. And the first figures that I had for the companies that were acquired in the merger were 1968. And continuing on, for instance, in 1969, the year that I came there, there were approximately 5600 [304] employees in all of the combined companies. At that time there were 11.66 per cent minorities in all of the companies combined. And in 1972 we had approximately 4,000 employees, which was a reduction of 30 per cent in the total number of employees in the company. However, the percentage profile had increased to 14.26 per cent, which I feel is significant, in fact very significant, the fact that we reduced the total number of employees by over 30 per cent. And in the years of no hiring, essential no hiring, we were able to increase our minority profile from 11.66 to 14.26.

THE COURT: During what period of time?

THE WITNESS: This was 1969 to 1972, sir. And this is particularly significant since we were essentially in a retrenching, merger situation where we were reducing the total number of employees, and you wouldn't think of it as actual hiring years. We were able to improve our minority profile, which I feel is a mark of success on our affirmative action program.

Q. Mr. Maier, what percentage of the line drivers who were hired during calendar year 1972 were minorities? A. Approximately 30 per cent line driver category were minorities in 1972.

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[305] (By Mr. Rissetto:) Mr. Maier, in San Antonio, what percentage of the work force is Mexican-American? A. Approximately 55 per cent.

Q. What percentage of the work force is Negro? A. Let's see, between—it is about 20 to 25 per cent approximately.

Q. In the State of Texas, what percentage of the work force is Mexican-American? A. About 8 per cent approximately.

Q. What percentage is Negro? A. About 12½ per cent. [306] Q. In your capacity as company compliance officer, have you made contacts with employment sources oriented to supplying minority employees? A. Yes, I have.

Q. Would you describe them, please. A. We have contacted the NAACP, the SIR Organization, the Urban League. I've been in close contact with the corporate compliance officer for the system who has referred applicants to me. We've been in contact with the Opportunities Industrialization Center whom I've known for a number of years and helped get started in Dallas. I have worked closely with them. I have actually been to their facilities and talked with them personally. We've talked with various groups from the OEO who have called on us at my request at our office. Several others. I believe they are all reflected in the information that we supplied in our interrogatories.

Q. In your capacity as the company vice president for personnel and training, are you involving in the hiring process for over-the-road drivers? A. Yes, I have a final say on all—It's all under my direction.

Q. Would you describe the hiring process from the start, the date of hire, please. A. Yes. When we feel that new road drivers are warranted [307] in a particular location, this falls under the responsibility of the vice president of transportation. When he authorizes vacancies to be filled, he notifies me, he notifies the director of safety and he notifies the terminal manager at which the vacancy is to be filled. Our process then is to recruit and take applications for employment. This is the primary responsibility of course of the terminal manager. But we send in our district safety supervisor to assist in this program since they are

the ones that are responsible for the safety program and the in-cab training and supervision of the line drivers. Sometimes if we had say four or five line drivers that we wanted to hire at a particular location, we may send two district safety supervisors in to recruit. These district safety supervisors are instructed to particularly seek out minority referral sources through the various state employment commissions, through such organizations as the Urban League, the National Association for the Advancement of Colored People. Where they have a SIR organization, they are instructed to contact those. They are also instructed to contact our own employees, both our minority employees and our non-minority employees to ask them for help in sending applicants to us. One of your best sources of applicants, regardless of what type job or what level is the personal referral.

Q. Focusing on the terminal manager, what is his roll [308] in the over-the-road driver hiring practice? A. His roll is the responsibility for seeing that the application is properly taken, completed, the local reference checks are made, checking to see that the individual applicant meets the company qualifications and falls within our policy guidelines for affirmative action and selection. When all of this is done, it is his responsibility to forward this information, either positive or negative, to the corporate office; at which time it is received by the director of personnel, who personally reviews each one of these applications to be sure that they are properly completed, to make sure that the individual meets the qualifications as set up. Those individuals that are minorities, he discusses with me personally immediately when they come in for my review as a part of my function as the compliance officer.

THE COURT: Mr. Maier, when you say "terminal managers have the responsibility of receiving these applications," does that mean that any terminal whether they have line or road drivers domiciled there or not?

THE WITNESS: No, sir. Where the vacancy actually exists. If there are no line drivers at a particular terminal, there would be no vacancies, so no applications can be taken.

THE COURT: What you are saying is that every terminal manager is not authorized to accept applications for [309] line or over-the-road drivers unless they domicile them at that particular station?

THE WITNESS: Your Honor, that's correct.

THE COURT: That's what I didn't understand.

THE WITNESS: That's right.

THE COURT: I understood you to say "terminal manager," and I figure there are a great many of them.

THE WITNESS: Only when there are vacancies. And if you don't have any line drivers there, there is no vacancy.

THE COURT: I understand.

Q. (By Mr. Rissetto:) What is the company's reasoning for this policy? A. Well, we feel like that we need control on everything that goes in. The terminal manager is responsible for the profit center which is the terminal, and the employees are the basis of our operation. More than 52 per cent of our revenue goes towards paying wages and salaries. So we feel that this is the most important aspect of our business, and we need very close control.

Q. Does your company policy allow an employee to apply at one terminal for a position in another terminal in the system? A. No, it doesn't allow for that.

Q. To the best of your knowledge have any employees [310] prior to January 1972 transfered from the city to the road clasification within the company? A. What date?

Q. Prior to January 1972 and after 1954. A. None that I could find, and I looked for it.

Q. What is the company's policy with respect to the transfer between terminals and within a single classification such as city drivers? A. Well, we don't have any—

our policy does not allow that they can transfer from one terminal to another. We feel like it is good personnel practice. We train the people in the area. It has already been brought out in the testimony that our people are oriented to our customers, and it is very essential that the investment that we have in training, we don't lose.

Q. Would you describe briefly the modification of the company's no-transfer policy of January 1972. A. Yes. A little background behind that. Being in charge of the affirmative action program of the company, I was very anxious to do everything. We had had indications from our employees that they were interested in going on the road. We felt like that the exposure that they had had in recent years would mean that we had city drivers that were familiar with the equipment. And as a part of our affirmative action program, in conjunction with the other officers of [311] the company, we discussed this, and we felt like that this was a move in the right direction, and that we had reached the level that we there was a good possibility that some of our city drivers could handle road equipment with some additional training, such as that, with the exposure that they had had. So therefore, we instituted this policy on a 30-day period in the Southern Conference at terminals where we had both city drivers and line drivers domiciled. This was offered in the first part of 1972. By the way, this policy also allowed for road drivers to indicate that they would like to go to the city. It worked both ways. There were approximately 202 who indicated an interest in going from a city position to the road. Of this 202, when we had vacancies that opened on the road, we gave these individuals an opportunity to try out.

And then approximately, oh, I'd say in the Southern Conference, approximately, oh, anywhere from 35 and 50 employees tried out. Of that, five of them are currently on the road. Many of them ruled themselves out after they tried it. They said it really isn't what we wanted. And they decided not to. Others couldn't meet the qualifications, the

driving tests or they had too many accidents. Or they ruled themselves out, they couldn't be away from home, or didn't meet the age qualifications and such as this.

Q. What is the ratio composition of the group that [312] went over? A. Let's see, there are two minorities and two non-minorities.

Q. Why did the company limit the no-transfer modification to only terminals where over-the-road drivers were domiciled? A. Well, this was based on recommendations that were made by myself primarily. Selecting personnel is not a real easy thing. It's a very complex thing. When you take someone and put them on a new job, there's a readjustment program to start with. And to take an individual out of the community where they have lived for many years and established themselves, put them on a new type of job, plus remove them from their familiar surroundings, this changes their whole life style. And we are interested in people being successful when we put them on the job because we invest a lot of money in training them, and we just can't afford to lose this training that we have had. And we feel like that this is sound personnel policy. And it was based on my recommendation from a personnel policy and selection point of view.

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CROSS EXAMINATION

BY MR. HEIDELBERG

[320] Q. (By Mr. Heidelberg:) Have you used any of the [321] other Mexican-American road drivers as referral source? Have you contacted them directly? A. Have I? I have not.

Q. When did you first find out, if you have, that the Plaintiffs in this lawsuit, in addition to Trinidad Gomez, have filed application for road driver positions with East Texas Motor Freight? A. I first learned of that letter in the late winter or spring of 1971.

Q. Have you taken any action with respect to those applications? A. I don't know what your definition of "ac-

tion" is, but I consider that I have taken action. As soon as I learned of them, I pulled their files. I reviewed them very carefully. I contacted terminal management at San Antonio and discussed them with them. I saw that under the circumstances that they were not in a position as such that we would consider their applications. They were city drivers. And the policy has already been testified to, it is a no-transfer policy. I think that's already been established. So the action necessary as the affirmative action coordinator was to review the file and investigate thoroughly what had taken place, which I have done. So I consider I took appropriate action.

Q. The end result was that they were not considered [322] for road driver positions based upon your no-transfer policy, is that correct? A. Based upon company policy. Yes.

Q. And that company policy is the no-transfer policy? A. Yes.

Q. I believe we have had testimony from Mr. Cloer on deposition and also Mr. Asbury yesterday that the application that was filed by the Plaintiffs and Mr. Gomez here as a matter of course should have been forwarded to Dallas. And you have testified contrary to that. A. Yes, sir, I'll give you an explanation if you would like, as to what took place. We mentioned the merger situation of our companies. When the companies were merged together, there were no personnel policies of the companies that we took over. There had been no training of terminal management in these other companies. Mr. Sager was one of the individuals that came from the Valley Copper State System. As I testified, he came in as terminal manager in San Antonio in the summer of 1970. He was not familiar with the policies and operating procedures of East Texas Motor Freight which was the parent company. And I am sure that he was not aware at the time, even though I am sure that there were people there that were aware. Coming in to a new company and everything as he was, he was not familiar with our policies and procedures, that all of this information is to

be forwarded [323] to the corporate personnel office. And I feel sure that this is the reason that he did not forward those letters to the corporate office. However, had he forwarded them, nothing would have changed because our policy that was established does not allow for transfer. So as far as any damage having been done, there wasn't. But we police these very carefully, and when I learned that those were in the file, I had every file in the San Antonio terminal reviewed to be sure that everything that was there was in the corporate office personnel department. We have a policy. We don't bat 100 per cent, but we bat pretty good on it.

Q. So based upon the fact, regardless of whether they applied or not, they wouldn't have been hired because of the no-transfer policy, is that correct? A. That's correct. There might have been other reasons that would have disqualified them too. I don't know.

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[327] Q. But you can't testify as to that from your personal memory based on this exhibit? A. No, I couldn't, not from personal memory, no. I know where various concentrations are. I know that. I have an over-all view. For instance, I know that 75 per cent of the employees here at San Antonio are in the minority classification group. I know that approximately 45 per cent in Houston, Texas are in the minority group. I know things like this. I know where the concentration areas are. I don't try to remember the exact number in every terminal location.

MR. HEIDELBERG: Your Honor, I renew my objection to the admittance of Defendant's Exhibit EEEE.

THE COURT: I don't think it has been offered.

MR. RISSETTO: We offer the exhibit EEE at this time.

THE COURT: I'm going to overrule the objection. I want to look at it. For whatever help it may be to the Court, I'm going to receive it for that limited purpose. I believe he testified he made it from the company figures. [328] He has relied on it here in giving his testimony. I would like

to have it as part of the record for whatever help it might be to me one way or the other. I will admit it and I will give you an exception.

MR. HEIDELBERG: Yes, Your Honor.

THE COURT: Any further questions?

MR. RISSETTO: Just one question, Your Honor.

REDIRECT EXAMINATION

BY MR. RISSETTO:

Q. Are you familiar with a gentleman by the name of Pedro Perez? A. Yes.

Q. What is his position with the company? A. He's the director of traffic. And those of you who are not familiar with the traffic function, the traffic function is possibly one of the most, if not, the most important position in our company. It is a price fixing function. It is one of our top executive positions. It pays in excess of $20,000 per year. Mr. Perez is a Mexican-American that I recruited from Arkansas Best Freight Systems back in 1970. I recruited him as a government sales representative. And I was instrumental in his promotion to director of traffic when that position became available.

[329] MR. RISSETTO: Thank you, Mr. Maier, no further questions.

RECROSS EXAMINATION

BY MR. HEIDELBERG:

Q. Mr. Perez was hired what time? A. In 1970.

Q. Do you remember which month? A. Oh, it was the early part of '70. It seems to me like it was March or April, something like that. I had to work on him a while before I got him to come with the company.

Q. Are there any other Mexican-American supervisory personnel in the Dallas corporate headquarters? A. Let's see, in the Dallas corporate headquarters. No. At the Dallas

Terminal, we have an office manager there, Mr. Noland Rodriguez.

Q. At the Dallas corporate headquarters, how many supervisory positions do you have? A. I guess supervisory positions, we have approximately 30 supervisory positions.

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[332] MR. PENSHORN: Your Honor, if it please the court, I think we have reached an agreement on a stipulation which will dispense with Mr. Shafer's testimony except perhaps for a couple of additional questions.

The stipulation reads as follows, Your Honor: The parties stipulate that the witness R. C. Shafer would testify as follows, and that same may be entered as testimony in this case.

Stipulation Number 1. The plaintiffs contacted R. C. Shafer regarding road jobs at East Texas Motor Freight, and he, Shafer, in turn contacted Everett Cloer, director of [333] Industrial Relations for East Texas Motor Freight who told him that if they domiciled road drivers in San Antonio, that East Texas Motor Freight would consider the plaintiffs and city drivers for road driver positions.

(2) Neither the plaintiffs nor any other East Texas Motor Freight employees ever complained to local 657 that East Texas Motor Freight discriminated against Mexican-Americans and Negros or that East Texas Motor Freight did not have any Mexican-American or Negro road drivers.

(3) No plaintiff has ever requested local 657 to take any formal action against East Texas Motor Freight's no-transfer policy.

(4) Under the bylaws of Local Union 657, only the affected members of local Union 657 working under the National Master Freight Agreement and the Southern Con-

ference City Supplement within the jurisdiction of Local 657 at special meetings can make demand from Local 657 to the negotiation committee for contract changes, and none of the plaintiffs or any other employees of East Texas Motor Freight has ever

(a) complained of discrimination by East Texas Motor Freight against Mexican-Americans and Negros.

(b) requested one contract for road and city drivers.

(c) ever requested the right to carry city seniority to road jobs.

[334] (5) Local 657 has never signed a collective bargaining agreement covering road driver jobs with East Texas Motor Freight.

(6) Since December 1970 the majority of the seven-man executive board of Local 657 has consisted of Mexican-Americans and Negros.

THE COURT: Is that the stipulation now, Mr. Heidelberg?

MR. HEIDELBERG: Yes, Your Honor.

THE COURT: Now, do you have anything further to offer?

MR. PENSHORN: I have nothing further, Your Honor.

THIS COURT: In other words, this dispenses totally with Mr. Shafer's testimony?

MR. HEIDELBERG: On direct, Your Honor.

THE COURT: On direct. You want to cross?

MR. HEIDELBERG: Very shortly.

THE COURT: All right Mr. Shafer, would you please submit yourself for cross examination.

Ray C. Shafer

being duly sworn and testified as follows:

CROSS EXAMINATION

BY MR. HEIDELBERG:

[335] Q. Mr. Shafer, you were approached by Mr. Modesto Herrera and Mr. Sadrach Perez with reference to obtaining road driver jobs, were you not? A. Yes, I was.

Q. On how many occasions, if you can remember? A. Mr. Herrera and Mr. Perez approached me on one occasion together.

Q. It is also correct that Mr. Herrera at one of the regular meetings stood up and made inquiries as to how he could obtain a road drivers job, is that correct? A. May I go into the conversation?

Q. We are talking about now at a regular meeting. A. It was at a meeting that Mr. Herrera brought up the subject of the road drivers possibly being domiciled in San Antonio because of the merger of VCS and East Texas. And at that time he asked me if it would be possible for the city employees or city drivers to be hired as road drivers for East Texas in the event that there were road drivers domiciled in San Antonio. I told him at that time that I would find out from East Texas if that would be possible.

Q. And following that, did you contact any person at the East Texas Motor Freight concerning the application? A. Yes, I did.

Q. Who was that? A. Mr. Everett Cloer.

[336] Q. About what time was this? A. It was in 69, sometime in 69. I can't remember exactly in 69. It was after I came back from the International Union. And April or May sticks in my mind, but I'm not real sure whether that's correct or not. But it was somewhere in the neighborhood of April or May, 1969.

Q. Do you remember that Mr. Cloer indicated that he would contact the Terminal Manager in San Antonio with

East Texas Motor Freight and make an application available to them for a road drivers job? A. Not at that time. No, I don't believe so.

Q. Did that occur at any time? A. Yes, sir.

Q. Would you please tell the court when that was? A. When Mr. Herrera and Mr. Perez were in my office on the second occasion and it was sometime in 1970, and it was somewhere in the neighborhood of August because of the application that they made, they told me at that time that they would like to transfer to the road in another area. And I told them that I was surprised to hear that they wanted to transfer to some other city. So I said "Well, I will contact them in regard to this." And I did contact Mr. Cloer asking him at that time about these fellows transferring to another area where road drivers are domiciled.

Q. Did Mr. Cloer indicate to you that he would contact [337] Mr. Sager and that the application would be made available? A. After some conversation, he agreed to it.

Q. You heard the stipulation between the parties that Mr. Penshorn read. One of those stipulations indicated that no formal action was ever requested of you by any members, to request that the seniority rosters be dove-tailed, is that correct? A. No action, no formal action has ever been requested by anybody that I take any formal action of any kind.

Q. Is it true that on numerous occasions you have told your members that because of the dual lines or the separate seniority rosters they would not be allowed to transfer with their seniority? A. No, sir, that is not right.

Q. What did you tell Mr. Herrera and Mr. Perez concerning East Texas Motor Freight's policy after they asked you about the road driver positions? A. At which time, Mr. Heidelberg?

Q. Well, at any time. Let me ask you this question: Did you ever tell Mr. Herrera or Mr. Perez or any other ETMF employee that they would not be allowed to transfer to the road because of the no-transfer policy maintained by East Texas Motor Freight? A. No, sir.

Q. What reason did you give to them for the fact that [338] they were not allowed to transfer? A. After the first meeting I had, I reported back to the people at East Texas. Mr. Cloer's conversation telling me that in the event that they domiciled road drivers in San Antonio, that they would consider the city employees as road drivers in the event that they needed additional road drivers.

After the second meeting where Mr. Perez and Mr. Herrera came into the office and talked to me in regard to transferring somewhere else, at that time I told them that I would try to get them an application for employment on the roads. I don't believe that I got back in touch with them. It is possible that I did. However, the terminal manager did get in touch with them and made available to them the applications or some form of application. So, they got the word through some type of communication. And I don't remember what the communication was at this time.

Q. But you never communicated either to the Southern Conference or to the International Brotherhood of Teamsters the fact that the separate seniority rosters kept or maintained your city drivers in city driver positions? A. No, sir.

MR. HEIDELRERG: I pass the witness.

MR. PENSHORN: We have no questions.

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[339] THE COURT: I will talk to you about that in a minute. Do all parties close?

MR. PENSHORN: Yes.

MR. BAAB: Yes, sir.

THE COURT: All right. Now, it seems clear to me, gentlemen, that the evidence shows that the union contract and company policy which admittedly seems to discourage transfer from city to line driver or across-the-road driver and vice versa, and actually in a sense prevents favorable

action not only on the Plaintiff's application for transfer without loss of some seniority or other penalty where non-domiciled drivers are involved, but it seems to me that the evidence suggests that this is done irrespective of race or national [340] origin. Now, that's the thing that's troubling the Court.

Now, what is the evidence is discrimination?

(1) Perhaps Mexican-American, Negroes, Angloes and all other city drivers who are employees, or city driver employees are bound by what is referred here by all parties as the no-transfer union contract and company policy. Now, we have evidence of that.

All right. Now, the other evidence, secondly, the small percentage of Mexican-American line drivers and the large number of city drivers. Now, this seems to suggest that there must be discrimination against Plaintiffs because of their race. But is this the only evidence of discrimination we have, Mr. Heidelberg?

MR. HEIDELBERG: Your Honor, as the Plaintiffs indicated when they opened their case, we didn't intend or could put a witness on the stand that had been told expressly he was not being given a road driver's job because of his national origin or because of his race. Now, our proposition——

THE COURT: But you do have two things here. One, you have a locked-in policy or a no-transfer rule that is in the union contract, and it is a part of company policy. Everybody admits that are parties to the contract that that is the union contract, and the company feels like it is very necessary.

All right. Now, is that evidence of discrimination [341] when taken with the fact that there is a very small percentage of Mexican-American line drivers in the state? Bear in mind you have opposed to that the fact that the company policy and the union contract normally contem-

plate that these people are employed where they are domiciled if they are line drivers. It's not true for city drivers.

Now, who has the burden of proof in this case? I am familiar with the normal rules with reference to burden of proof in every other case except civil rights cases. And there, I don't know. The plaintiff normally speaking has the affirmative of establishing by a preponderance of the evidence all of the essential elements of his case before he can recover. Civil rights cases, it will shift right in the middle of the stream on me.

Mr. Justice Berger in the Swan case says in all of these school cases that the burden of proof normally, if there's a fairly equal distribution, it's then upon the Plaintiff to establish that there has been an invidious discrimination against the ethnic minority involved where there's a complaint leveled. However, he says, when it gets to the unitary system, and it gets to be all of our race, then the burden shifts to the school board to establish by a preponderance of the evidence that there is no discrimination, or where the percentage begins to go against what the citizen percentage is or the ethnic makeup of the entire school district.

[342] If one of the elementary schools, for example, gets fairly close to one race, then the burden shifts, according to Mr. Justice Berger in Swan, and that's a civil rights case, to where then the school authorities have to come forward with credible, strong evidence, which I can only reason to be preponderance of the evidence.

Give some thought to who has the burden of proof in this case. And does the same, more or less, doctrine, apply that was announced in Swan and reiterated in Winston-Salem School cases that when there remains a large ethnic disproportionate or percentage, and it's getting pretty close to where only the people in this one line, line drivers or across-the-road drivers are all of one race, does that suggest, like the school cases, that the burden shifts. And if it does shift, has the company failed to meet its burden?

Many school cases, you can find that almost a 100 per cent Mexican-American, but the school board has and can and often does come forward and shown that there is no discrimination, it has met its burden.

Now, those generally are things that have occurred to me in the trial of these three cases. Is there anything, Mr. Heidelberg that you feel like I don't understand about this?

MR. HEIDELBERG: Your Honor, I don't want to [343] belabor——

THE COURT: I don't want you to make a prolonged argument, but I would like to have your views briefly.

MR. HEIDELBERG: Well, briefly, I think what we had to do was come forward and show, and this is in the complaint, the area that we were concerned about, and that was the State of Texas that is encompassed by the Southern Conference of Teamsters Collective Bargaining Agreement. We felt that the jurisdiction of the Court extends throughout the State, and I think that is true. We felt that when we came forward and showed the Court that prior to the hiring—excuse me, prior to the filing of the charges—

THE COURT: Prior to the hiring, I think you have a stipulation in the record that there was no discrimination.

MR. HEIDELBERG: Well, I meant filing, Your Honor, instead of hiring. That was a typographical error on my part. What I meant to say was that prior to the filing and the receiving of the charges of discrimination——

THE COURT: There's no de jure discrimination. If there is any de facto segregation, I think in these cases they are permitted. There might be discrimination, but it wouldn't be intentional discrimination.

MR. HEIDELBERG: Your Honor "intentional" under Title 7 has no significance.

THE COURT: I understand.

[344] **MR. HEIDELBERG: I don't want to belabor the point, but we feel that by showing that there was only one Mexican-American and no Blacks employed prior to their receipt of the charges, and that one Mexican-American was forced upon them by virtue of the acquisition of another company, and that was subject to the Collective Bargaining Agreement, that they, on their own initiative, hired no Mexican-American line drivers in the State of Texas, no Blacks in the State of Texas, zero on both counts, that that establishes the prima facae [sic] case in itself of discrimination. And the cases I think are abundantly clear on that point.**

As we will indicate in our brief, we feel that the case of Bane (sic) versus the Roadway Express——

THE COURT: Well, do you feel that's a law point or is that something that the Court is going to have to resolve as a fact question?

MR. HEIDELBERG: Your Honor, I think the burden of proof —and the question is going to be whether or not we came forward with a prima facea [sic] case, and whether they rebutted it by showing business necessity or——

THE COURT: You think there has been a fact issue raised here?

MR. HEIDELBERG: Well, actually I think Mr. Weiss is correct in his pre-trial order when he says most of the issues involved here are legal.

[345] **THE COURT: All right. Now, Mr. Smith testified, and of course he's representing the International Union, and he testified that even though there were no Black line drivers or Mexican-American in the beginning, that was explained in most instances in the Southern Conference by the fact that while the jobs were available and the union did not discriminate against them because of their race or national origin, that they were not able to have the facilities. They didn't have the Housing Act in 1952 and 1954 to**

help them. And under those circumstances, they didn't apply.

Now, under those circumstances, there was no discrimination, according to Mr. Smith, up until the passage of the Housing Act, Equal Housing Act, until the facilities were made. They couldn't get them to apply because they didn't want to be embarrassed or humiliated. Now, that's the International Union's position with reference to that.

Now, what they are doing there is trying to explain why there is a disparity in the percentage. Wouldn't that to some extent explain perhaps why the disparity was great?

MR. HEIDELBER: No, Your Honor.

THE COURT: Of course, you have got to also remember that in Dallas, the Mexican-American population is very small. It's so small that it's not recognized there in Dallas, according to the census. Now, this is in the re-apportionment case that Judge Justice and Judge Goldberg [346] and I sat on. And to our amazement, the evidence was undisputed, according to the last census that the Mexican-American population in Dallas was hardly definable as a minority. It's such a small percentage. Of course, they're taking the position that those drivers are employed out of Dallas, or places where there are not large concentrations of Mexican-Americans.

By the same token, the Black population is a far greater factor than it is in Bexar County. I think Bexar County is 50.1 now. Each census period it is predominantly getting greater in favor of the Mexican-American. And the Anglo is decreasing, and the Black is growing a little bit. But I'd say as of the last census, my recollection was, and I'm just speaking from memory, I think it was 50.4, percent. My law clerks probably have a better memory of this than I do. 42 or 43 percent I believe were Anglo, and five or six were blacks. Now, that's in Bexar County.

But in this particular situation, Mr. Heidelberg, you have the city drivers where they live, over 50 percent Mexican-American, which very closely approaches it on city drivers. In all three of these cases, it's strikingly similarly that the percentage of city drivers where they are domiciled, have a striking comparison to the percentage of Anglos and Blacks that are domiciled in San Antonio. Now, those are points that are occurring to me that I would like to have you address yourselves to.

[347] MR. HEIDELBERG: Well at the same time, Your Honor, you can't compare zero to any percentage figure. And also we feel of course that our people made application, and those applications ended up in Dallas and the company completely disregarded them. I think that makes this case a little more strong, a little stronger perhaps than some of the cases that have been before the court.

THE COURT: You did have applications in this case which in some of the other cases they did not have.

MR. HEIDELBERG: Yes, Your Honor. They were informed that all they had to do, rather than go to Dallas, which they could have done I suppose also, but they were informed by management to file this application and they would be considered for road driver jobs. It is in the stipulation. They haven't been considered. That in itself indicates to me that——

THE COURT: Of course, you got to also bear in mind the testimony that's used to rebut that was that the applications were there. They looked at them. They considered them to the extent that they found people not qualified because they didn't live there and they wanted people there at the local level who were domiciled there. And they explained the reason why they had to have a man in Pecos, why they had to have a man in El Paso and why they had to have line drivers other than in San Antonio. Well any-

way, that's [348] generally. Now, do you have anything further that you want to add?

MR. HEIDELBERG: I want to say that basically Mr. Maier did testify that the ultimate reason for his refusing to consider the applications was because of the company's no-transfer policy. And I won't belabor the Court with——

THE COURT: That's right, he did say that. But then he added on his own, sort of, well, that perhaps may not be the only consideration. We did look at the. The no-transfer policy and the fact they didn't live there and that sort of thing was the primary thing. But on the other hand, he said, about the applications, there might be other things too that might disqualify them.

Well, any way, I am trying to point out the weaknesses of your case, if there are any, so that you can——

MR. HEIDELBERG: Yes, sir, I think we all have anticipated the various things.

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[17]

[Incorporated Testimony of W. C. Smith]

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W. C. Smith.

called as a witness by the Defense, was duly sworn, and testified as follows:

DIRECT EXAMINATION

BY MR. GILLESPIE:

Q. Would you state your name for the Court, sir. A. My name is W. C. Smith.

Q. Where do you live? A. I live in Jackson, Mississippi.

Q. What is your present job? A. I am presently employed by the International Brotherhood of Teamsters in the capacity of General Organizer.

Q. Do you hold any other positions a this time? A. At this time, no.

Q. Would you briefly outline your history of employment, starting with your first job in the trucking industry. A. I became a member and was employed as a road driver [18] in August 1948. I drove a truck for a number of years. In 1953 I became a job steward for the union. In 1954 I became a vice president.

Q. Excuse me sir, which union was this with? A. Local 891, Jackson, Mississippi. In 1954 I became vice president of the local union, continuing to drive a truck, I then worked part-time for the local union up and through the year 1965. I became its president. I remained its president until 1969. I then accepted a job with the International Union, and I hold that job today.

Q. All right. Would you briefly outline your roll that you now perform as the general organizer for the teamsters, for the International Teamsters. A. I work on an assignment basis. I am assigned to various jobs by the general president, Frank Fitzsimmons. I am also assigned to the Southern Conference. I help negotiate contracts, assist local unions in strikes, hear various grievances, and various other items, trusteeships and so forth.

Q. You state that you help negotiate contracts? A. Yes, sir.

Q. How long have you been doing that, sir? A. From 1948, from the standpoint of a member. I participated on the member level at that time. In 1953 I participated in the job steward roll. And from that date forward, even as the vice president of the local union before becoming [19] a full-time employee of the local union I participated in various contracts.

Q. Would you say that you are among a handfull of people with like experiences in the trucking industry from the employee standpoint, from the teamster's standpoint? A. I believe that to be true, sir.

Q. Now, I'd like to ask you a few questions about the internal structure of the various teamster unions. First of all, what is the lowest level of organization among the teamsters? A. The teamster local union itself.

Q. What basis of membership do they have? A. The basis of membership is determined by occupation. Is that what you mean? Such as freight——

Q. I want to ask, when they make a decision, when a local makes a decision, is that decision made by a vote of the membership or by a delegate situation? A. It is a membership organization, and that decision is made by a majority.

Q. A majority vote of the members of that union? A. Involved, yes. A majority vote of the members involved.

Q. Okay. Now involved in this lawsuit is the Southern Conference of Teamsters. What system is involved there for making decisions? Is it a delegate or membership [20] body? A. The Southern Conference is comprised of a delegate body who are elected.

Q. Who elected these delegates? A. They are elected by members of the Executive Board of each local union within the area involved.

Q. Does each local union send delegates to the Southern Conferences? A. Yes, two delegates per local.

Q. Now, also in this lawsuit is the International Brotherhood of Teamsters. Are they a delegate body? A. Yes, sir.

Q. Where do the delegates come from? A. They are comprised from local unions throughout the United States. The number of delegates allowed by each local union is determined by the membership in that particular union on a pro-rata basis, so many members entitles them to one delegate, and for each 650 after that, another delegate.

Q. Does each local union have at least one delegate to the International? A. Each local union is entitled to at least one regardless of the membership.

Q. Would you tell me roughly and approximately the size of the teamsters in terms of membership. How many members are covered by the contracts the teamsters negotiate? [21] A. In excess of 2,000,000.

Q. Would you tell me approximately how many local teamster unions exist throughout the country? A. This will vary somewhat on a time basis because of mergers and because of additional charters. But a good rough figure is in excess of a thousand.

Q. I want to discuss briefly the history of bargaining within the teamsters. This has been gone over to some extent by Mr. Penshorn, and I'll try not to duplicate. Can you tell me if now there is national negotiating? A. Yes.

Q. Are there advantages in having a national negotiation process? A. Yes.

Q. Could you specify those advantages. A. A very good example is here before this Court. Yellow Transit operates from the Canadian Provinces to the West Coast. Here is a local union that has testified that their membership and employees with this company is in the neighborhood of 50. If they were negotiating singularly and by themselves here, their strength or threat of a strike would be practically none. Yet by national bargaining, and you are speaking here of a freight line again of great size where testimony has indicated that they have at least 10,000 employees, that when we now sit down to negotiate with them on a national [22] basis, the economic bargaining power is far greater.

Q. Do the trucking companies themselves negotiate on a national basis? A. Most of the employers do. Yes.

Q. Would it place the local unions at a disadvantage if they were not negotiating on a national basis and the truck companies were? A. Very definitely. Yes, sir.

Q. I want to talk briefly about the mechanics of bargaining within the trucking industry, within the teamster locals, etc. I think Mr. Penshorn again covered what happens at the local level. Moving from there then to the Conference level, is it true that proposals are submitted from the local unions to the Southern Conference of Teamsters? A. That is the first step in which the proposals are sent to.

Q. And what does the Southern Conference of Teamsters do with these proposals? A. At that time, the proposals from each local union within the conference are reviewed. In many cases, you get duplications. For example, a local union in San Antonio will make the same proposal on a particular item as one in Dallas might. This is a clerical process. And they are then transposed and condensed down to the same proposal rather than duplicated proposals. And on occasions, a proposal made, [23] that on its surface it is frivolous or impossible, that is withdrawn and not presented to the employer.

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[24] Q. So after the Southern Conference reviews the proposals, does it then submit them to Washington? A. Yes.

Q. To what body does it submit them? A. This is submitted to the International Union and the full conferences submit all of the proposals to the International [25] Union.

Q. Now, what happens after that, to these proposals? A. Each local union is then notified that the proposals have been completed, they have been reduced to a proposal form, typewritten. Each local union is notified to send two delegates to Washington, D. C. At that point, the delegates have the contract proposal read, explained to them, explained that this will be carried before the employer, or if they would like anything else added to it or delete anything in those proposals. And then it is voted on by those delegates from the local union body.

Q. Assume that the vote is affirmative, what then happens? A. If the affirmative vote is to present that proposal to the employer, it is then proceeded through negotiations and through the various committees to submit that proposal to the employer and employer groups.

Q. Who does the negotiating? A. You are talking here about a contract in various supplements and areas which covers 450,000 people. So the largeness of it and the complexity of it must be taken into consideration. You have

various groups that do negotiations of various articles. For an example, last time you had a group of people that negotiated only on the National Master which is the upper portion of all of the contracts. You had [26] another group that negotiated on the sleeper cab section only of the road contract. You had another group that negotiated only on the piggy-back section. I, myself, was assigned as the chairman for both the Southern Conference-City, the Southern-Conference-Road, the Southern Conference-Office and Shop Committee.

Q. Does the national negotiating committee play a part in this process. A. The national negotiating committee in the last negotiations conducted their negotiations on the lower floor or first floor because they are in constant contact with the different areas and the different supplements. And here you must recognize that you are talking about the Western Conference, the Eastern Conference, the Southern Conference. And they keep in contact with the progress that each one are making in their supplemental areas.

Q. How is the national negotiation committee formed? A. By appointment.

Q. And who generally makes up this national negotiation committee? A. For an example, the Southern Conference, you are appointed by the area director, and that is with some reference to a cross reference of the Southern Conferenc, with local presidents coming from various local unions and trying to receive a cross section of the whole Southern Conference. [27] Not all of them from Texas or all of them from Florida, but trying to receive one or more people from each locals.

Q. Does the national negotiation committee operate with the threat or power of attorney from the local unions? A. Yes, sir.

Q. Why are members of the International Brotherhood of Teamsters and members of the Southern Conference of Teamsters selected to be part of the national negotiation

committee? A. It is my belief that a person working for the International and the Southern Conference has at various times the opportunity to travel to different localities within the Southern Conference. You will know the problems in Florida as well as Texas, where a man who resides such as in San Antonio may be only concerned with the problems at this location, and only attempt to negotiate problems and answers for this location. By having a Conference or International organizer there, he is able to sort of neutralize and have an unbiased effect on the entire area.

Q. Ultimately the contract that is hammered out in negotiations is submitted to the union members at the local level, is that correct? A. Yes, sir.

Q. And if a majority of those people vote against that contract, do negotiations begin again? [28] A. It is possible. If a majority of the people reject a contract, the negotiation committee then has the right to go back into session with the employer. However, the general president can order that a strike vote be taken and a strike vote would be conducted.

Q. Does the International Union approve for form, any contracts negotiated by the national negotiation committee? A. I do not understand the question in its form.

Q. Does the International Brotherhood of Teamsters review the contract in any way? A. Review it?

Q. Yes. A. They have a right to review any contract. The Southern Conference has a right to review any contract on the basis of keeping one local onion from taking away another local union's jurisdiction or negotiating a substandard contract.

MR. GILLESPIE: May I approach the witness, Your Honor?

THE COURT: Yes, you may.

Q. (By Mr. Gillespie:) I have handed you what is marked as Defendant's Exhibit HHH, an exhibit by the International Brotherhood of Teamsters and the Southern Conference of Teamsters. Would you read what is marked Article 12 Section 11C. [29] A. "Approval or disapproval

by the International Union, Area Conference or Joint Counsel of wage scales or other agreements is not intended to impose any liability on such organization or its officers. And such organization and its officers do not assume any liability of any nature to any person or persons for such approval or disapproval."

Q. Mr. Smith, is that intended to reflect the delegate or agency status of the International and the other organizations mentioned in that paragraph? A. Yes, sir, in my opinion.

MR. GILLESPIE: May I again approach the witness?

THE COURT: Yes, you may.

Q. (By Mr. Gillespie:) Now, I would like to ask you some questions relating to the history of the development of separate seniority lists for road, city, garage and clerical units within the trucking industry. Is it a fact, Mr. Smith, or do you know, whether the trucking industry was organized on the basis of various separate seniority units? A. Yes. Usually terminal by terminal, city by city.

Q. And were units developed for road, city, garage and clerical workers? A. Yes.

Q. What was the historical basis for organizing separately instead of on one merged seniority list?

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[30] Q. (By Mr. Gillespie:) Would you tell me, Mr. Smith, whether one reason for the development of a separate seniority list for these various categories of workers was because it gave benefits to these workers that wouldn't be had through a merged seniority list, a single seniority list? A. Benefit?

Q. Yes. A. The latter part of the question again.

[31] Q. Yes. Not just because it helped in organizing, effectively organizing these units, but also because it gave some realized values and benefits to the individual employees themselves. A. You have a benefit here that has not been brought out in this particular case. The testimony

here is that some 40 or 45 people are employed in San Antonio, Texas, and they enjoy terminal seniority. Now, that means that a person on layoff from another area cannot come and take their job away from them, even though they may have more seniority in the city of Dallas or over-the-road at Bachelor Springs. And in this particular case, there are people on layoff in Canada. At one time it was the Adalay (sic) System and it has just been purchased by Yellow. So therefore, those people cannot come to San Antonio and bump these people and knock them out of a job even though they might have more seniority.

Q. Was the recognition of appropriate bargaining units by the national labor relations board at all responsible or tied in with the historical development of separate seniority units? A. Yes. I'll give you one actual example, as short as I can. Howard Hall Company of Birmingham, Alabama, the majority of the city people desired to join the teamsters union. They joined the teamsters union. A contract was negotiated under an appropriate unit established by the National [32] Labor Relations Board. That was a city unit. The road drivers today do not elect to join the teamsters union. They do not belong to union membership and are not covered by contract. If you were to say that this was one unit, we would represent a majority of the employees and we would then be placed in the position of forcing the drivers to be covered by a contract, the road drivers who do not desire to do so and have expressed a desire not to belong.

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Q. (By Mr. Gillespie:) Mr. Smith, can you state whether racial considerations had anything to do with the organization on separate seniority lists? A. No, sir.

Q. Would you tell me whether there was any trend to have uniform Anglo on roads and minorities on city seniority lists? A. No.

Q. Can you think of any examples in which road drivers from a long time back have been black, or minority workers. A. One specific instance is Mid South Memphis, Tennessee, a predominant number are black. They have been black for many [33] years and they are still black.

Q. Are you familiar with the history of the Southern Trucking Company? A. Southern Forwarding?

Q. Yes, Southern Forwarding. A. Yes.

Q. Can you tell me about that. A. Southern Forwarding has a predominant number, and I gave you the name of the wrong company. Strike Mid-South. It is Southern Forwarding.

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[34] Q. Now, I'm going to ask questions concerning racial discrimination as reflected in the Teamsters International Southern Conference. Are you aware of the position of the Southern Conference of Teamsters and the International Brotherhood of Teamsters with respect to racial discrimination? A. I know that for many years, the policy of the Southern Conference and the International Brotherhood of Teamsters has been no discrimination of any kind. The very lawsuit, the title of the act, the lawsuit that is brought about here, the International Brotherhood of Teamsters lobbied for that act and tried to seek its passage in Congress.

Q. Can you tell me of any efforts by the Southern Conference of Teamsters to remedy the problems of getting minority workers into road driver positions? A. On an individual effort by local unions or by Conference?

[35] Q. I would like to talk about by conference. A. By conference. For many years there was a man by the name of M. W. Mullow (sic) who was the director of the Southern Conference of Teamsters. And he was very interested in the plight of the socalled minority. He personally instructed the local unions for many years there would be no discrimination of any sort in any manner within the Southern Conference.

Q. Can you tell me whether the Southern Conference has made any recent proposals or is contacting officials in the

trucking industry to allow city drivers to work on the road? A. If you go back three years ago, the word "transfer" or "move" from city to road or road to city, was never mentioned. This was established. It had been established for many years, as the testimony here indicates, and it was never considered. Now for the last year or two years, you constantly hear city employees requesting to go on the road. Hearing th[illegible]equests and with the present language of the contract, barring a compulsory move by the union to force an employer to compulsorily allow a man to go, local unions have been instructed to approach various employers and ask them that when they do need a new road driver, they now need an additional road driver, to go to their city employees and offer him the opportunity to go to the road. If he so desires [36] to go to the road, let him then go to the road before they hire a man from the street.

Q. Would that be done on the basis of their city seniority? A. Well——

Q. I mean would the offer of a road job go to the people first with the highest city seniority? A. For clarification, if they needed one road driver, then they would go to the most senior man on the city and ask him first. If he declines, then go to the second man. But I want you to understand that we are asking employers to do this and we have no way to force them at this time.

Q. Has the Southern Conference discussed socalled retreat rights? A. Yes. We have asked the employers again, and we agree with the employers, if they offer the city man the opportunity to go to the road and become a road driver, if after 30 days he has examined the conditions, the wages, the locale in which he has to work, if he decides to change his mind within 30 days, let him come back to the City and keep the seniority which he enjoys under the city contract.

THE COURT: Mr. Smith, would he lose his seniority under your plan if he—would he have to resign as a city driver to become a line driver, and would he consequently lose his seniority? How would he fit in with the other line drivers

[37] and those who are waiting as casual drivers who are given preference and who had some seniority?

THE WITNESS: In order to answer the question, Your Honor, you have to start in reverse. First, you have to go to the casual. The road contract as separate seniority has well been established——

THE COURT: Well, the reason I asked that question is they are saying here and the testimony is undisputed that the casual line drivers, that is the field from which the line drivers are taken and they have to meet certain qualifications. Isn't that your understanding?

THE WITNESS: That's the testimony.

THE COURT: Are the city drivers going to go ahead of all of them if they want to go?

THE WITNESS: If you will let me explain. And there is contract language to back up what I'm saying. Article 3 of the National Master has reference to casuals. It says that a local union and an employer can agree to work casual road drivers on a non-accumulative seniority basis for absenteeism or vacation. Let me clarify that. It means that if a local union and a company agree that they are going to work ten casuals as road drivers, but they are not going to accumulate any seniority at all and they will not have first opportunity for employment as a road driver. Now if it is as a result of these ten casuals working, and the employer and [38] the union determine "we need one new city driver", then can then go to this top man in the city and offer him the opportunity to accept the road-driving job ahead of the ten casuals. There is contract language to back this up.

But once he accepts it, he is now accepting it on a trial basis. He has worked in the City as it has been testified here for ten years. He believes he'd like to have a road job, but he's not sure. He has never been a road driver. So we ask the employer to let him try the road driving job out for

30 days. If he doesn't like the road job after 30 days or can't make a living or it is not what he thought it was, then give him retreat rights back to the city from whence he came with his seniority and he has lost nothing.

But on the 31st day, he has now passed his probation period as a road driver, and again there's contract language to verify this, and he likes the job, he likes the conditions, so he wants to stay. Then he establishes a date for bidding purposes as a road driver effective the day he pulls his first road trip. He carries with him all of his seniority for retirement purposes, vacation purposes or any other purpose with the exception of bidding.

THE COURT: Is that being done at this time?

THE WITNESS: In some locations. Yes, sir.

MR. GILLESPIE: My next question relates to contract interpretation. We have gone into the effect of the separate [39] seniority system to some extent.

Q. (By Mr. Gillespie:) Could you tell me how one acquires seniority within a given seniority unit? A. He goes to work there.

Q. Is that the only way you can accrew [sic] seniority, for example, on the road, by working in a road unit? A. From the language of the present contract for bidding purposes, for bidding purposes, a man's bidding seniority is estabished on the basis of what day he went to work for that employer.

Q. Under the contract, can you acquire seniority for other purposes besides bidding, without working in a specific unit but by being hired by the same employer? A. All right, I'm going to pose a hypothetical instance to you. A man works in the shop for ten years as a serviceman. And now an opportunity comes to become a city driver. He would rather drive a city truck. So he moves over. And these are two separate units, two separate contracts. So now he becomes a city driver. And on the 31st day, he es-

tablishes new seniority for bidding purposes. Now, he can't outbid any former city employee, but he still has ten years seniority for vacation and retirement purposes. And the contract gives him that ten years of service towards vacation, towards retirement.

Q. Would that hypothetical apply for switching between [40] road, from road to city or from city to road? A. Yes. Because as long as he is a continuous employee of a singular employer, and the fact that an employer called in an individual and said "I will give you the opportunity to go from city to road or from road to city or shop to office or whatever it might be, but you must resign your city seniority." He would only be signing what accumulated bidding seniority he had, and the employer's letter would mean nothing towards his accumulated seniority for vacation.

Q. Are these instances of the contract true regardless of race? A. Yes.

Q. Now, are there any ways in which the contract in dispute in this case offer relief to the people who have suffered racial discrimination? A. Yes.

Q. Could you specify how relief could be obtained through the contract? A. Well, it can be obtained in several ways. One, let's say he's not even an employee of a company or the member of a local union. If he has knowledge that that employer is covered by a labor agreement, he can go to that teamsters union and the teamsters' business agent can file a grievance in his behalf even though he's not an employee and not a member. That's an extreme case.

[41] Now, if he feels that he's employed there and a member, and he feels that he has been discriminated, he, himself, through his steward or through his business agent can file a grievance to the appropriate committee. That can be filed under Article 38 which is, as you know, the non-discrimination article. It could be filed on the basis of his seniority or whatever area it might be. Maybe they didn't pay him like they did another man.

Q. Okay. Is there a statute of liminations [sic] connected with the filing of grievances? A. Yes. Basically, the grievance procedure is a creature of the contract that's spelled out in the contract. If a man had a grievance, he would have a specific length of time in which to file that grievance. But that's based on knowledge and also whether it's a continuing claim or not.

Q. All right. Could you tell me if—I'm going to use a catch-word and then explain it. If the no-transfer rule is a creature of the union contract. Now, what I mean by the no-transfer rule, is the rule that would prevent someone who is say a road driver from ever going and becoming a city driver in a company, or vice versa? Now, is that in any way dictated by the contract? A. For several days the word "transfer" has been used very loosely. The contracts do not prohibit a man transferring nor does it permit a man to transfer. It does not say that he [42] cannot. It does not say that he can. It simply says that seniority is accumulated under separate units, roads, city, office, shop. If an employee, member, desires to move from one location such as city to road and there is a vacancy, and the employer wants to hire him, and he's qualified, then that is permissible.

Q. Are the mechanics of transfer in any way affected and influenced by the teamsters themselves, or is this a matter for the employer? A. Again, you use the word "transfer".

Q. Okay. In changing from say the city to the road, would the requirements for changing from city to road be at all set by the teamsters? A. The present contract language says that the local union shall have equal opportunity to furnish people. It does not give him an exclusive right to furnish people. He would have certain rights if this failure to give employment was based on discrimination. He then would have contract language to say you're not hiring the right people.

Q. Suppose the company had a policy whereby one could go from city to the road, and that company refused to allow

a union member to go from city to the road because of his race, would that person be able to file a grievance under the contract? A. Yes. Article 38 would provide, or the article which [43] has been violated.

Q. Now, does the teamsters international have any, or Southern Conference, have any hand in setting the standards for hire, or the qualification for hire of truck drivers by any of the trucking companies? A. The qualifications established by the employer are their own as long as it doesn't violate our right of union membership or discrimination.

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[44] Q. (By Mr. Gillespie:) Is it true that health standards differ for line drivers than for city drivers? A. By law. Yes.

Q. If a person has had a history of heart illness, or [45] if a person has less than 20-40 vision, is he qualified to be a road driver? A. If he has a history of heart or high blood pressure or bad vision, the answer is he's not qualified.

Q. Is this a DOT standard that's being violated? A. It would be violated if he was hired. Yes.

Q. Could these people be qualified for city drivers? A. With a heart condition. Yes. If his eyes were less than 20-40 he could drive anything that was non-freight within the municipal area.

Q. If the seniority system included only one unit, can you forsee [sic] any difficulties because of these different health standards? A. There are far more road drivers disqualified due to health conditions under the DOT requirements, both heart, visual and health problems, who would, as an end result, bump back into the city, and the city people would be displaced as a result of that.

Q. And is it possible that these city people would not be able in turn to go over to the road? A. That would depend on the individual.

Q. All right. A. He could or could not qualify. That would stand on its own.

Q. Now, let's assume for the moment that there are [46] four bargaining units. Let's assume that the shop unit, the garage unit and the clerical unit were also combined. Do you know if more than a handful, or at least a sizeable number of mechanics are qualified to drive? A. Virtually all mechanics are qualified to drive.

Q. What is the basis for that statement, sir? A. Well, probably the most knowledgeable man you got of the equipment itself that is being used is the mechanic. He knows the mechanics of it, and he's called upon to drive it from time to time within the confines of the city.

Q. Does the road driver generally make more money than a mechanic? A. Now, that's been kicked around pretty good as to who makes the most money. You have to again go into who makes the most money per hour. A road driver actually makes eight cents less than the city driver does. The mechanic makes slightly more. So who makes the most money for the most amount of work or the least amount of work. That's a determination made by the individual.

Q. Is it possible that if there were only one unit, mechanics who can drive would bump a driver out of a job. And would you say that it would be more difficult for the driver to replace the mechanic than vice versa? A. I would say it would be much harder for a driver to become a mechanic than it would be for a mechanic to become [47] a driver.

Q. Now, are you familiar with different—I'm talking now about safety. Is winter driving generally more difficult in the city or in the road? A. In the road.

Q. Do you know of or could you anticipate any difficulties based upon winter-driving and the distinction between road and city driving if there were only one seniority unit? A. Well, of course the primary problem would be the road jobs would probably become the least desirable job in ice and snow and hilly country. The road driver, or the senior road driver would probably make an effort to stay in the

city in the cold wintry months and try and come back to the road in the more desirable summer months.

Q. As a practical matter, assuming that a man is bumping from the road to the city, what city driver would he bump? Would he bump the man with high seniority? A. It would depend on his seniority.

Q. Yes. A. Yes.

Q. Well, generally he would have to bump someone with lower seniority? A. Lower seniority than himself. Yes, sir.

Q. Based upon your experience in the industry, can you [48] tell me whether most employees prefer separate seniority units? A. My belief today if the question was submitted to the drivers within the Southern Conference of Teamsters on a total basis as to whether the city-road or road and city wanted a combined seniority roster, it would be rejected by an overwhelming majority of the people. That's my opinion. It's built on knowledge that I have gained over 48 years—since 1948. Not 48 years.

Q. Can you tell me any incidents in your experience where city drivers have protested against having merged seniority systems? A. We have an unusual occurrence now. At Kingsport, Tennessee which is under the Southern Conference of Teamsters, Mason-Dixon has the domicile of in excess of 300 road drivers. Seventy-eight road drivers filed a grievance requesting that their seniority be dovetailed into the city seniority roster. The basis for this was they have had several drivers within the last two or three years disqualified under hearing problems, disqualified under heart problems and high blood pressure problems. It is their feeling that if they were protected by a combined seniority roster and with their many years of seniority they would have been allowed to go and work in the city with Mason-Dixon at Kingsport, Tennessee. There was a protest or a counter-grievance filed by the city employees numbered in excess of a hundred who requested that the [49] road drivers not be dove-tailed into their seniority roster.

Q. What was the result of that grievance? A. The grievance was heard with both sides considered and the decision of the committee was that it was an improper hearing, and the committee had no right to reach a decision. It was a contractual matter.

Q. As a practical matter, is it true that the seniority units were not merged? A. No, they were not merged.

Q. Would a single seniority system result in inefficiencies within the trucking line itself? A. Employers have argued for many years that a combined roster city-road, road-office-shop, any combination would seriously affect their efficiency and their operating ratio. And this union has been convinced that that is true. It has been convinced by the testimony and the arguments that was argued at the bargaining table over the years.

Q. How would this inefficiency manifest itself? A. Example: I'm a road driver. I drove for 13 years. If by some since [sic] of the imagination I would have gotten laid off in Jackson, Mississippi and came to San Antonio as a road driver, and you dispatch me from San Antonio to Dallas, Texas, I would have simply stopped at the first service station, picked me up a road map and found out how to get to Dallas, Texas. I'm a regular road driver. I can follow a road [50] map. But if I came to San Antonio as a city employee, and if you gave me a load of freight and told me to carry it down to the corner of Third and Alamo, it is liable to take me three weeks to get there. It would be like a city driver becoming a cab driver. The knowledge of geographical locations is extremely important to city people.

Q. I want to talk about one more topic, and that is how you would rate the road and city job comparatively. Could you tell me, sir, which one, the road drivers or the city drivers have longer hours? Which one of the two? A. Well, again, you may find a road driver that works 30 hours a week based on his seniority. That's all he can work. But I would say if you were talking about as a whole, that the road driver performs longer hours of service than the average city man.

Q. Is it necessary in order for the road driver to make more money than the city driver for him to work more hours? A. I would say yes. He could also work as many hours and make less.

Q. Who is at home more often, assuming full employment by both the road and the city driver? A. Again, this would vary somewhat, but by a great majority the city man would be home more.

Q. Now, assuming that a city driver works as much as a road driver, would he have—how would his pay stack up? [51] A. Now, this is a big area. The city driver is normally paid five eight-hour days or 40 hours a week. If he works over eight he gets time-and-a-half in a single day. If he works over 40, he gets time-and-a-half. If he works on the 6th day, which could be, if he was a Tuesday through Saturday man, then Sunday would be his sixth day, he would get time-and-a-half for the sixth day. If he worked the 7th day, which would be Monday, he would get double time. Now, assuming that he worked seven days, ten hours a day as a road driver might, and a road driver is allowed by law 70 hours out of an eight-day period, and let's say that he was on a mileage run and run 500 miles per day on each run for a seven-day period, you take the city employee working ten hours a day, pay time-and-a-half after eight, pay him time-and-a-half on the sixth and pay him double time on the seventh day, my opinion and my arithmetic says the city men would make more money.

Q. Would you tell me, based on your experience in the industry whether the person with the low seniority, a low amount of seniority on the road has a more difficult time making a living than a person with a low amount of seniority in the city? A. Again, a city man, once he becomes regular is guaranteed 40 hours a week. He is guaranteed that until such [52] time as he receives a lay-off letter. And the layoff letter can be issued for lack of work. A road driver goes to work tomorrow on the bottom of the board. He is known as a regular employee working off of the extra board, and that means simply one thing. He is called on the

availability of freight and equipment. He may or may not run. If he does not run, he does not get a guarantee.

THE COURT: This has all been covered. It depends on the circumstances of the individual driver, the job, the availability of equipment, the availability of work. We've been through this.

MR. GILLESPIE: I have one more question. I want to confer with my co-counsel for a moment.

Q. (By Mr. Gillespie:) Would you tell me whether the road and city drivers receive the same insurance, the same holiday benefits, the same vacation benefits and the same pension benefits?

THE COURT: That's new. All right.

A. The answer is yes.

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[55] Q. All right, sir. Now, what I'm getting at is simply this: Under the circumstances that I previously gave you, if an individual, assuming that he belongs to a minority group, holds a card in the teamsters union, manages eventually to get a job as a regular city employee, does not the double or the two separate seniority lists make it very difficult and create a hardship on this individual to become a line driver with an opportunity, if he feels that this is what he wants to do, and he feels he has an opportunity to make more money, if he were able to become a line driver? A. My answer to you is a qualified no. It is qualified on this basis: It does not create a hardship for him to go from San Antonio, Texas as a city driver to become a road driver. It does, if he wants to become a road driver, it gives him the opportunity to go. He can go. And he can carry with him the same date for vacations and for fringe benefits. He cannot go to Dallas, Texas and go ahead of people who have been hired and who have existed and worked as casuals and fought their way through the hard times, and now [56] come in and bump ahead of them. This union must

not only represent the employee who is employed here in San Antonio as a city driver, we must represent the road driver as well. And we must recognize the road driver's bidding seniority the same as we recognize the city, the shop or the office.

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[Deposition of Everett E. Cloer]

[4] the witness hereinbefore named, being first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINAT.ON

BY MR. HEIDELBERG:

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Q. And you are presently employed by East Texas Motor Freight? A. Yes.

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[5] Q. And what is your present position? A. Vice president in charge of industrial relations.

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[12] Q. And how long did you work for Strickland? A. I left Strickland in —well, I went with [13] ETMF January 1 of 1965.

Q. And what position did you assume at ETMF? A. Director of industrial relations.

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[14] Q. Okay. Well, explain to me if your responsibilities and duties have been changed since 1965 to the present. Would you tell me your designation at the time of each change and also what your responsibilities were changed to. A. Well, really, they haven't changed that much, it's still industrial relations.

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[16] Q. Could you tell me which individual of the company is responsible for hiring road or line drivers? A. Well, Mr. J. D. Louis is responsible for transportation and he—when he needs line drivers, then he makes that known to Mr. White, who is the director of safety, and Mr. White, through his force then employs the road drivers.

Q. Is that Mr. Harold White? [17] A. Yes.

Q. Are you involved in the decision as to whether or not a particular person is going to be hired as a road driver? A. No.

Q. Who makes the final determination? A. Well, that's made between Mr. White and the personnel department.

Q. I assume that you're pretty familiar with Mr. White's method of obtaining road drivers, are you? A. Oh, I'd say fairly, yeah.

Q. Can you tell me how he goes about locating a road driver, let's say if he needs a road driver for a position in, let's say, Pecos, Texas. How would he go about finding one? A. No, I don't know what method he uses when he arrives on the scene, no.

Q. Dealing only with road drivers, can a local terminal manager make a decision by himself to hire a road driver? A. No.

Q. It has to be cleared with Mr. White and Mr. Louis? A. Well, Mr. Louis makes his need known. If he needs additional road drivers, then he solicits the [18] safety department and then it's, of course, as far as—Mr. White checks out the driver as far as his ability and this type of thing and personnel will check out the application and references, so that's the reason they are both involved.

Q. When you say Mr. White checks out the driver's abilities, does he actually get in the truck with him and drive with him? A. Either he or one of his supervisors will, yes.

Q. Are you familiar with the process or procedure of employment of city drivers? A. It's handled in about the same—well, it is handled the same way.

Q. In other words, the terminal manager can't make a final decision regarding the employment of a city driver? A. Well, no. The terminal manager—he can make—hire a man, but then the safety department and the personnel has the final say.

Q. In other words, he has to meet certain employment qualifications maintained by the company, which are determined here in Dallas, is that correct? A. That's correct.

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[20] Q. Are you familiar with the company's no transfer policy? A. Yes.

Q. What does the no transfer policy mean to you? A. Well, it meant that we didn't transfer from one classification to another.

[21] Q. Let's be a little more specific if we can. By one classification to another, are you talking just about between city drivers and road drivers? A. Well, all, yes. All categories, all classifications. Shop people didn't go to the dock, city people didn't go to the shop.

Q. How about supervisory personnel? A. In what respect?

Q. Well, terminal managers, for example. Were they allowed to transfer from one city to another? A. Oh, yes.

Q. Okay. What other positions would be allowed or would not be covered by this no transfer policy? A. Well, we're speaking of contractual people on the no transfer policy.

Q. Okay. You're limiting yourself to just the people that are covered by various collective bargaining agreements? A. Right.

Q. Have you had any discussions with any representatives of East Texas Motor Freight concerning the reason for the no transfer policy? A. Yes. There were several reasons for it. Number one, we felt that the city people were familiar with the city, they were familiar with the customers, [22] they were driver-salesmen. We needed those people in the city to handle our business.

We also felt that transferring city people to road jobs interfered with their family life. They had been accustomed to being home with their families every night; put them on the road, road driving takes them away from their homes. The family gets upset because they are not home at night, it's really a big change in their life.

Q. Who was the person with the company that informed you of this policy? A. The policy was in effect when I went with the company in '65.

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[26] Q. Is the no transfer policy still in effect? A. No, it's—this was amended in January of this year, '72. January 6, to be exact.

Q. Could you tell us what form or what form the policy takes now? A. Yes, it—we posted the notice in the terminals in—oh, let's see. I guess it was February of this year and they were during a 30-day period the employees could bid as to where they wanted to go, transfer from the city to the road or from the road to the city. That was posted in the terminals where we have road drivers domiciled. Only those city drivers at those domiciled points were allowed to make their request known.

And policy states that when vacancies occur at those domiciles, those people in seniority order will be permitted to transfer from the city to the road or from the road to the city; retain their company seniority for fringe benefits. They have a 30-day trial period at which time they can go back to the old position without losing seniority, but if they stay over 30 days, then they lose their old classification seniority and gain new seniority for layoff purposes, bidding purposes as of the first day that they went on [27] the new job.

Q. Why was the policy changed? A. Well, there was, I think, several reasons. Many of the other companies were changing their policy. There were consent decrees being agreed to, put in effect throughout our industry.

Q. What do you mean by consent decrees? A. Between the government and the companies, settling some of the suits, I'm sure you're familiar with.

Q. Well, the record might not be clear, Mr. Cloer. Would you explain exactly to me what type of suits and what was the nature of these different lawsuits brought by the government that caused other companies to change their policies? A. I don't know all the details of the suits. I am familiar that there were suits. I know there were some consent decrees. I am familiar with one consent decree to some extent and that's the one that Strickland Transportation entered into here in Dallas where they agreed to let city people transfer to the road.

We had a lot of employees that, city employees, that thought they wanted to go to the road. All of this was taken into consideration. We felt that we had a moral obligation that could be involved and just [28] thought it was to the best interest of our company to go ahead and amend the policy.

Q. If you are familiar with the nature of the moral problem, could you tell us what it was? A. Well, some of our city drivers, for instance in Dallas, couldn't understand why we wouldn't now go ahead and allow them to go to the road when people down the street like Transcon or some of the other companies were permitting it.

Q. Were there any other reasons for the modification of the no transfer policy? A. I think that generally covered it.

Q. Could you tell me why the modification applied only to those terminals where East Texas Motor Freight domiciled line drivers? A. Well, I think you'd have a real seniority problem if you tried to bring a man in from somewhere out in the field where you didn't have drivers domiciled and put him ahead of some drivers, a city driver you had in Dallas. I can't—we couldn't see any justification for this when you have sufficient drivers in a terminal like Dallas out here to take care of your needs.

See, city people have terminal seniority, you'd be getting into a modified system seniority situation if you did it differently.

[29] Q. Well, you do have a modified seniority for your road drivers, do you not? A. In the road contracts only.

Q. Now, you mentioned that you would have seniority problems if you brought the city drivers in from non-road driver domiciles. Could you explain a little bit more about what would happen if you were to bring somebody, let's say from San Antonio to Dallas. What type of problem would that create based upon the contracts and based upon the company policy? A. Well, there's no—as far as the contract is concerned, there is no provision for this for handling seniority in that instance.

Q. Would it be correct to say that you were unsure as to what seniority classification or designation that individual would have in this situation? In other words, if he was domiciled in San Antonio and for that reason you limited your modification only to those terminals where you had domiciled line drivers? A. As far as I'm concerned it would be no different from taking a city driver out of San Antonio and bringing him in here and putting him in Dallas, as far as the city operation is concerned. And there is certainly no provisions for that or any way to handle their seniority.

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[31] Q. Did you have any negotiations with the Southern Conference of Teamsters concerning the modification? A. Well, I wouldn't say it was negotiations. We showed the Southern Conference the courtesy of reviewing the policy before we put it in effect.

Q. And do you know who was involved as representative for the company in these dealings with the Southern Conference of Teamsters? A. Yes, I was.

Q. You were? A. Yeah.

Q. And who was the representative of the Southern Conference that you dealt with? A. Mr. Murry Miller.

Q. And what is his capacity? A. He was area director of the Southern Conference at the time.

Q. Did you have lengthy discussions with him or were they short in nature? Just describe the types of conversations or communications that passed between you and Mr. Miller concerning the adoption of this modified no transfer policy. A. Well, this was back in October, I believe it's October, '71. He was in Miami, Miami Beach. I flew [32] in there and out in one day. He reviewed—read the three or four page article I had and said he had no objection to it. And that was the extent of it.

Q. Did he raise any questions pertaining to the fact that those city drivers in non-road driver domiciles would not be included in the policy? A. Did he question this?

Q. Yes. A. No, this was not questioned. No.

Q. Did he have any objections to any part of the modification? A. There was none. We did not have the 30-day probationary provision in the company policy and he suggested that the employee be given a 30-day probationary period. And this we agreed to and modified it to that extent.

Q. I believe there is a provision in the modified road contract that allows for a similar 30-day probationary period, is there not? A. You have a 30-day probationary period in all contracts of new employees.

Q. Did you discuss the modified no transfer policy with any representatives of local unions? A. No, they were mailed copies. Each local union was mailed a copy of the policy and the letter of [33] explanation, told when it would go into effect and so forth. That was only mailed to the locals that—where we had road drivers domiciled.

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[34] Q. Prior to the amendment of no transfer policy, the policy did have the effect of locking in all city drivers into city positions, is that correct? A. That's right.

Q. Prior to the modification of the policy, do you know of any city driver working for East Texas Motor Freight

that transferred from a city position to a line driver, road driver position? A. No.

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[37] Q. (By Mr. Heidelberg:) Prior to allowing a person to transfer from the city to a road driver position, does the company attempt to qualify these individuals as road drivers? A. The city people?

Q. Yes, the people that have transferred. A. Yes, we give them the same test that we give any new employee.

Q. New road driver employee? A. Yes.

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[39] Q. Has the company given consideration to discontinuing the modified no transfer policy? A. No.

Q. Do you know the reason for it? A. Yes.

Q. You've outlined certain problems that the company has had by virtue of the modification. Have these problems led the company to reconsider the initial decision to modify the no transfer policy and to reinstitute the previous policy? A. No.

Q. And do you know what the reasons for that have been, if there are any reasons? [40] A. Well, the policy has only been in effect one year.

Q. When the policy was initiated, was there a time frame that was going to be considered for purposes of determining whether or not that the program would be successful? A. No. No, we find it pretty hard, once you put a policy in, give some of the people the benefit of it and then do away with it. We have no intentions of removing the policy at this time.

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[42] Q. As I understand the modified no transfer policy, the city driver maintains his company benefits for fringe benefit purposes—— A. Right.

Q. —but loses his accumulated seniority for job bid and layoff purposes, is that correct? A. That is correct.

Q. Why didn't the company allow a city driver to carry his seniority with him for all purposes when he transferred to a road driver position? A. Then the policy would have been in violation [43] of the agreement.

Q. Did you have any discussions with Mr. Miller or with any other representative of the Southern Conference of Teamsters concerning this aspect of the policy? A. No.

Q. Prior to the adoption of the modified plan, in your own mind would the no transfer policy have the effect of discouraging a city driver to make application for a road driver position? A. Would it discourage him?

Q. Discourage the city driver from applying for a road driver position. A. With our company or some other company?

Q. No, with your company. In other words, he would lose his job bidding and layoff seniority, assuming that he were to become a road driver. A. Well, when we take the application of the employee he puts on there what he wants, if he wants city work or if he wants road work.

Q. You're talking about the initial application for employment? A. He puts this on his application.

Q. Do you know of your own personal knowledge whether the person that takes the application directs the applicant to indicate whether he wants to be a road [44] driver or city driver? A. Yes. We have space provided on the application as to the position he's applying for.

Q. Have you had occasion to review applications, let's say as far back as 1960? A. Have I? Yes.

Q. And your testimony is that there was a location or a place on that application form to designate whether a person wanted to apply for a city driver or a road driver position? A. It's for the position he's applying for. There's a blank showing what position he's applying for.

Q. And it's company policy to have that person notified that he is to put either city driver or road driver? A. No, the guy—the applicant comes in, he knows if he wants to

be a city driver or he knows if he wants to be a road driver. We don't tell him to put on his application if he wants to be a clerk or city driver or—he's coming in looking for a job, he should know what he wants to do.

Q. What happens if a man comes into Dallas, for example, where you have road drivers and city drivers domiciled and put down truck driver, is the person taking the application directed to say "Do you want to [45] be a city truck driver or do you want to be a road truck driver"? A. I'd say generally if a guy put truck driver down, you'd probably consider that as city.

Q. And what would he put down if he wanted to be a road driver? A. Well, he'd put down road driver.

Q. Is that the common term used in the trade? A. I'd say so.

Q. Are you familiar with the procedures that a person—let's say an employee not domiciled here in the city where the corporate headquarters are, what procedure he would have to follow to make application for a position with East Texas Motor Freight other than the position that he presently occupies? A. You mean a city employee in Houston, Texas that wanted to go to work in the city of Dallas, Texas, what procedure do we have?

Q. Okay. That would be one example. A. We would not permit this.

Q. Let me ask you this: If there was a city driver in San Antonio who wanted to drive over the road, is it your testimony that there is no way that he could get to become a road driver with East Texas Motor Freight? [46] A. Under our policy, that's right.

Q. There's no provision for him resigning, for example, his position as a city driver and making an application for a road driver position in Dallas? A. I suppose a man can quit any time, but that wouldn't mean he would necessarily get the job unless he's qualified.

Q. Prior to initiation of the modified plan, do you know of any city drivers that made application for road driver positions? A. No.

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[48] Q. (By Mr. Heidelberg:) Mr. Cloer, you are familiar with the fact that one of the plaintiffs in this case, Jesse Rodriguez, filed an application to transfer to an open road position in August of 1970? A. I understand that is a fact, yes.

Q. And when did you first find this out? A. Oh, I don't know. I couldn't put a date on it.

Q. Has it been in the last year? A. Oh, yes, I'd say in the last year.

Q. It couldn't have been before then? A. It could have been. I am just not that sure of the time.

Q. Do you recall the fact that Modesto Herrera, the other plaintiff in this lawsuit, filed an application to an open road job? A. Yes, I understood there was three involved.

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[49] Q. What are the circumstances surrounding your discussion with Mr. Shafer concerning this? A. He asked me if we would permit these people to transfer.

Q. Did he call you? A. I don't recall whether he called me—well, he mentioned it several times to me. We was generally at the grievance hearings or something like that when it came up, possibly the first time. It's been a long time ago, I don't remember exactly how it come up, but he had mentioned it to me.

Q. By a long time ago, you mean in 1970, sometime? A. I'm just not sure of the time, I don't know.

Q. Well, do you remember specifically any occasion in which you spoke to Mr. Shafer concerning the application of these individuals, the plaintiffs in this lawsuit, for over-the-road transportation with ETMF? A. Spoke to him, but I can't put a date on it.

Q. Okay. How many time, if you can make an approximation? A. Oh, I'd say at least half a dozen times.

[50] Q. And what did Mr. Shafer say to you on those occasions? A. He asked me if we couldn't transfer, to give them over-the-road jobs, fill one of the vacancies with them.

Q. Was he mentioning any vacancy in any particular terminal? A. Well, no, he was talking about terminals where we had road drivers.

Q. Okay. What else did Mr. Shafer say to you concerning the transfer of these individuals? A. I can't—I don't recall just what the conversations were other than at the time that he was talking to me about it. Of course, I was not in charge of transportation, but at that time I was familiar with the fact that we had, oh, some 75 to 100 road drivers on layoff when we first started talking about it.

Q. Okay. What response did you get from Mr. Shafer concerning these requests for transfer? A. Well, I advised him that we had people on layoff, that we couldn't even consider.

Q. What else did you advise him of, if you can recall? A. Oh, one—well, at one time I recall we—I believe we were talking about Dallas and Pacific [51] and I told Mr. Shafer that I didn't see any way that we could transfer people in from San Antonio ahead of the Dallas people, because we had Dallas people that had also expressed a desire to go on the road.

Q. As best you can recall, those are the only reasons that you gave Mr. Shafer or the only explanation you gave Mr. Shafer concerning the application of these three plaintiffs for road driver positions? A. The only explanation I have him?

Q. As to why the company would not consider their applications for road driver positions. A. Well, I don't—as I say, I'm not sure of the timing on this, I don't know whether we had talked about the fact that it was against company policy at that time or—I just don't recall what the timing was on it.

Q. Well, can you remember whether or not you told him it was against company policy to allow these individuals to transfer to road driver positions? A. I don't specifically remember telling him that, but it would have been.

Q. Your testimony is you can't remember whether you did or did not tell him that? A. No, I don't remember. Like I say, we talked about it several times and it's been a long time ago, I don't recall, you know, the exact conversation.

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[54] Q. Prior to the initiation of the modified no transfer policy, did you know of any Negroes that were driving as road drivers for East Texas Motor Freight? A. I believe we had some driving out of Granite City, Illinois.

Q. How many were there, do you know? A. No, I'm not sure, two or three.

Q. Do you recall the names? A. No.

Q. Are they still working for the company? A. I believe so.

Q. You don't recall when they were employed? A. No.

Q. Do you know of any black or Negro road drivers that have worked in the State of Texas in that area covered by the Southern Conference collective bargaining agreement? A. No, there was not.

Q. Do you know of any Mexican-American road drivers that have worked in the State of Texas in that area covered by the Southern Conference collective bargaining agreement? A. Not by name. We have some, but I don't know them by name.

Q. Do you know where they are domiciled? [55] A. Some in El Paso, I believe, and I'm not sure about the other locations.

Q. Let me ask you this: Is El Paso included within the Southern Conference collective bargaining agreement? A. A portion of it.

Q. Which portion? A. Road drivers that operate east of El Paso are in the Southern Conference.

Q. And those drivers that operate west are in the Western Conference? A. Right.

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authorized and acting Notory Public in the State of Texas.

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SADRACH GARCIA PEREZ, the witness, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testifies as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. PENSHORN:

Q. Mr. Perez, will you state your full name for the record, please sir. A. Sadrach Garcia Perez.

Q. Where do you live? A. 7966 Niagra.

Q. In San Antonio, Texas? A. Yes.

Q. How long have you lived in San Antonio? A. Thirty years.

Q. Were you born in San Antonio? A. No. I was born Sanderson, Texas.

Q. When did you come to San Antonio? A. I was five years old, around 1942. Something like that.

Q. And you have lived here continuously since that time? A. Yes.

Q. Can you speak just a little bit louder, Mr. Perez? I am having trouble hearing you? A. I will try. I am having trouble with my throat. I have [4] been sick for three days.

Q. Incidentially, if there are any of my questions you don't understand, feel free to ask me to clear them up before you answer them so we are certain we have your answer. Okay? A. Okay.

Q. I believe that you became a regular employee of East Texas Motor Freight in November of 1959. Is this correct? A. November, 1959, yes.

Q. Prior to going to work for East Texas, for whom did you work? A. I was working with a roofing company, I believe. Construction company.

Q. Do you remember the name of it? A. Craig Bros., or something like that.

Q. Crea? And what type of work did you do for this company? A. It was construction work, and I handled many different types of jobs. Mostly assisting the different workers and more towards the carpenter's helper. And I was a delivery. I made their deliveries, and I would also bring the material within the job site.

Q. All right. Is it correct that you became a member of Teamster Local 657 in January of '59? A. I am not sure if it was January. A close as I can [5] remember. When that question was asked of me, it was around that time, because I started working in '58 with East Texas Motor Freight as a casual. I remember that it was something like maybe forty days or forty-five days before I actually joined the union.

Q. I see. Then after you joined the union, and prior to the time you became a regular employee of East Texas, you worked for several months as a casual? A. Yes.

Q. During this period of time between the time you joined the union and the time you became a regular for East Texas, for whom did you drive as a casual driver? What freight lines? A. East Texas Motor Freight.

Q. Only? A. Yes.

Q. In your answer to the local union's questions, which were submitted to you in this case, I believe you stated that you had made an application for a road driver's job to representatives of East Texas about thirty-five times. Is this correct? A. I was just estimating. It might be more than that, since I was there quite a while, and I would bring up everytime I had a chance.

Q. I see. Now, during the entire period of time that you [6] worked for East Texas, did they ever have road drivers stationed in San Antonio, where you were employed? A. Not that I know of.

Q. Why did you make an application so many different times, Mr. Perez, to representatives of East Texas? A. So I could get the job.

Q. Did they indicate to you in any of your converations with them that you should apply later on? A. What do you mean "later on"?

Q. Well, at the time you were talking to them in any given instance when you asked for a road driver's job, did they indicate to you that you should check back with them later on about such a job? A. During the first times that I asked, way back when I was starting, no. Later on, more recently, before the time that I was fired, yes.

Q. Well, what terminal were you seeking to get a road driver's job at? A. I was willing to go anywhere. I am speaking about when I started working. I was willing to go anywhere where I could get a job. The reason for this was because I was not working too much, and I believed I qualified as a road driver.

Q. Even after you became regular, you were not working too much. [11] A. 1950.

Q. Mr. Perez, in any of these approximately thirty-five times that you have talked to representatives of East Texas about a road driver's job, did you ever make any complaint to the effect that Mexican-Americans and Negroes were being denied such jobs because of their race or national origin? A. As close as I can remember, yes. I stated to Mr. Truitt this.

Q. Now, who was Mr. Dick Truitt? What was his job with East Texas. A. He was Terminal Agent, whatever that meant at that time. That is all I knew about.

Q. And when was this that you told him that? A. This was a little prior to becoming even a regular at East Texas Motor Freight. I was a casual.

Q. Prior to becoming a regular the first time? A. Yes.

Q. This would be sometime in the latter part of 1959? Is that correct? A. Yes.

Q. And at that time you told Mr. Dick Truitt what about discrimination? A. Why I could not get a road job, and when he answered me, he told me things like these jobs like these were not for us. What [12] he meant by "us" I don't know. But he was talking to me and I am a Mexican American.

Q. All right. What else did he say besides "these jobs are not for us?" A. It might not have been at that exact time, but—

Q. Now on that occasion? A. On that occasion I do not remember the exact answer to that.

Q. Well, as well as you can recall, exactly, what did he say to you on that occasion? A. I remember his answer to one of my inquiries around that time. It is possible that that is the time. He said that the equipment was too expensive for us to be driving.

Q. What else did he tell you on that occasion? A. On that occasion, he said general things like, "we try. We treat you people nice here." And all that kind of stuff, but exactly what he said, I do not remember.

Q. At that time were there any road drivers stationed in San Antonio working for East Texas? A. Not that I can remember.

Q. Did you make it clear to him that you were asking for a road driver's job at another terminal? A. Very clear.

Q. All right. Now, was there any other occasion which a [13] supervisor of East Texas indicated to you when you spoke about a road driver's job, that they were not for Mexican Americans or Negroes? A. They would not come as far as I am concerned, say that these jobs are not for Mexican Americans or Negroes. But they would generalize that these jobs were not for us. But "us" were the city drivers that were there and mostly Mexican American.

Q. Now, on any of these occasions, when you asked representatives of East Texas about road driver jobs, did you go to any representative of the local union and report to

them what they had told you? A. Well, it depends on what you mean by "report".

Q. Tell them about it? A. Tell them, yes.

Q. All right, when was the first occasion? A. One of the first occasions was when I was wanting to join the union. Mr. Ray Shafer said he could not allow me to join the union because there was not sufficient work for me. At that time I told him that I was already working with East Texas Motor Freight. He did not want to take my money. We discussed the matter. In this discussion, it was brought out that why couldn't I drive the truck for East Texas Motor Freight also on the road. There was a—it was a discussion. It was [14] not like a written complaint or a grievance, or anything like that. I doubt if at that time I knew of the grievance procedure. I was just about to join the union. I was just informing myself as to how I could work with East Texas Motor Freight.

Q. Now, this was before you even became a member of the union? A. Before I even became a member of the union.

Q. And what did Mr. Shafer tell you on that occasion? A. Simply that he didn't want to take my money and that there was no work.

Q. Well, did you interpret that to mean that he wouldn't let you in because of your—you were a Mexican American? A. I do not know what—I mean I didn't make an interpretation of the reason at that time. I was answering the fact that I had discussed my job at East Texas Motor Freight.

Q. All right. Do you make an interpretation of the reason now as to why he wouldn't let you in then? A. No.

Q. All right. Now, exactly what did he say to you about getting a real driver's job at East Texas on that occasion? A. Nothing. He didn't answer. All he said there wasn't [15] enough work, period. He didn't specify road, or he didn't specify city, or anything.

Q. But you did tell him on that occasion, before you were a member of the union, that you wanted a road driver's job with East Texas? Is that correct? A. I inquired at that time the reason why we could not drive at East Texas Motor Freight.

Q. As a road driver? A. As a truck driver. Whichever, both. He was talking about the fact that they had no city jobs but they had road jobs.

Q. In San Antonio? A. Not in San Antonio. Coming into San Antonio, I believe, from Longview at that time. I was not informed where the point was. The reason for the company doing this was the fact that the trailers were there. The freight was there and there was no work for us. So the reasons that they would give us was the fact they had no road drivers to bring the trailers from their point of origin, or whatever. At that time I did not know it was Longview. So I offered myself to the company to go and get the trucks.

Q. You say the trailers were there and the freight was there. Where are you referring to? What location? A. At this time, I believe it was Longview, Texas.

[16] Q. How did you know there were trailers and freight there? A. We had occasions to talk with many of the road drivers who came in and also the company themselves would come out and say it. In other words, I believe they were giving us excuses as to why they would not hire us, even in the city.

Q. In other words, is this correct, Mr. Perez, that you are of the opinion that in 1958 and early 1959, they had sufficient trailers and freight located at Longview, Texas to where they could have given you a job as a road driver, is that what you are saying? A. This is what they were saying.

Q. Is that what you are telling us today? A. I am telling you that this is what they told us.

Q. Who told you that? A. The different dispatchers—the agents.

Q. Told you personally? A. Yes.

Q. Who told you that, personally? A. At that time it was Mr. Charlie Lewis and Mr. Dick Truitt.

Q. Told you what about the Longview trailer and freight situation? A. That they had the freight to come into San Antonio, but they did not have the drivers to bring them in.

[17] Q. All right. What else did they tell you about that? A. Not too much more. They wouldn't talk much. They would just give us, I thought at that time, just excuses, not to hire us, even in the city.

Q. Now, on what other occasions did you speak to any representative of Local 657 about your conversation with forman, or managers of East Texas about road jobs. A. On many occasions that I did not answer there, because I do not remember the exact dates, and this is what you were asking for. The ones that I did remember is the one in 1966, and the one in 1969, and then later on it was sometime in 1970, the latter part of 1970, into 1971, until the day I was fired.

Q. All right, Mr. Perez. Let's start with the date that you first drove a truck or were employed by East Texas Motor Freight. This would be back in November of 1958 or somewhere in the latter part of 1958, would it not? A. Uh huh.

Q. All right. Now, you have already told us about the first occasion that you went to a union representative about racial discrimination. Now, I want you to tell me the next time following that that you went to a union representative about racial discrimination? A. Like I said, I do not remember the dates or time, but I would discuss this with Shafer very, very often.

[18] Q. All right. I want you to tell me about the next time that you remember that you went to him and talked to him about it. A. The next time I remember is the one I stated in 1966.

Q. All right. So you cannot remember any conversation with any representative of Local 657 regarding racial discrimination between the latter part of 1958 and 1966? Is that your testimony? A. No, sir. I can not remember the dates. I remember many many occasions in between that time when I discussed it with Mr. Ray Shafer.

Q. All right. I want you to tell me about each occasion. That is what I am trying to find out and what you said and what he said. A. Like I say, I do not remember. I would just generally bring it out and ask him how come we couldn't get on the road.

Q. All right. Will you answer my questions, Mr. Perez, please? Starting with the first time that you drove or worked for East Texas Motor Freight, I want you to tell me about the first occasion that you can remember that you went to a representative of the local union and complained about racial discrimination? A. The ones that I can remember are the ones I have related, because the dates and all of that, and I remember the [19] answers I got and all that. The others in between, I cannot remember the dates. I was very close. I would meet union representatives sometimes on a weekly basis, and sometimes more often, and every time we discussed East Texas Motor Freight, or our job, or anything like this, I would bring it up and I would discuss it.

Q. Bring what up? A. The fact that how come we could not drive on the road. The fact that how come we were laid off when there was freight to be delivered. General complaints. All of the time complaining.

Q. All right. I am only asking you now about complaints that you made to the local concerning racial discrimination, Mr. Perez, nothing more. And I am not asking you for the specific dates. I am only asking you to tell me about the instances that you remember, starting with the very first one. A. All I can remember is that there were several times.

Q. All right. Tell me about the first time and who you talked to. A. All of the time I would talk to Ray Shafer.

Q. You never spoke to anyone but Ray Shafer about racial discrimination at East Texas? Is that correct? A. I am speaking about between the time I first started up until the time I noted on your question there, 1966. [20] During that time I discussed it only with Ray Shafer, yes.

Q. All right. Who else have you discussed it with besides Ray Shafer. A. Sometimes with Ezzell and sometimes with Bill Selby.

Q. Who else? A. Ray Culla, and the union officers.

Q. Which union officers? A. Andy Garza, Manual Perez.

Q. Who else? A. Senovio Chavez, Bob Dominguez, Jesse Martinez, and there might be others.

Q. Now, you have discussed with all of these individuals racial discrimination by East Texas Motor Freight? A. In reference to the road, yes.

Q. My question is, have you told all of these individuals that East Texas Motor Freight was discriminating against Mexican Americans and Negroes as a result of the road driver jobs? A. As far as I can remember, when I discussed something like this, I would discuss it for my own personal experience, or for what was happening to me. I would not discuss it as far as anything else.

Q. My question to you is, did you tell all of these individuals, whom you have named, that East Texas Motor Freight [21] discriminated against Mexican Americans and Negroes as a result of the road driver jobs? A. I do not understand what you want me to say.

MR. PENSHORN: Would you read the question back?

COURT REPORTER: "Q. My question to you is, did you tell all of these individuals, whom you have named, that East Texas Motor Freight discriminated against Mexican Americans and Negroes as a result of the road driver jobs?" A. I still don't understand it. I thought you said you would rephrase it if I didn't understand.

Q. You want me to ask the question again? Is that what you want?

MR. HEIDELBERG: Counsel, he has indicated he doesn't understand the question. Rephrase it or clarify it.

Q. All right. My question to you is this: Did you tell all of the people that you have named that East Texas Motor Freight was discriminating against Mexican Americans and Negroes in the giving and hiring of road drivers? A. I thought I already answered that. I would not generalize as to Mexican Americans or Negroes. What I would discuss something, I would talk about my own particular case, [22] I would not be telling any of these individuals. I would be discussing or inquiring as to why East Texas had this—did this.

Q. Did you tell any of these individuals that the reason you couldn't get a road driver's job, was because you were a Mexican American? A. I am sure that I mentioned it, yes.

Q. Which one did you tell it to? A. I cannot remember exactly, but I am sure it would be somebody like Jesse Martinez, and of course, Ray Shaffer.

Q. Anyone else that you told it to? A. Maybe not as such, because of the reason that I was a Mexican American, but you can't hide the fact that I am a Mexican American, and they discriminated against me.

Q. Now, when did you tell Ray Shafer the first time that you couldn't get a road driver's job because you were a Mexican American? A. I do not remember. The closest would be the date I gave you.

Q. What is that? A. Sometime in 1966.

Q. You do not, at this time, remember having said anything to Shafer prior to 1966 about racial discrimination? A. Well, as far as I can remember, or as close as I can [23] remember, I cannot come out and say that exactly, because of the fact of what the union did. It just wouldn't make sense. I was with Ray Shafer and he was union and he was supposed to be representing me over there, and to bring out

something like this bluntly, "they are discriminating against me because I am a Mexican American" I would bring up the charges—I would bring up the complaint. That I spelled it out "Mexican American" may be I didn't. But the complaint was there.

Q. All right. Now, let me ask you this, Mr. Perez: At this time, right now, do you remember a single occasion when you complained to Ray Shafer about racial discrimination at East Texas Motor Freight? A. Any time from when I first joined the union to this day?

Q. Right. A. There are some times when I had, some times when I did it indirectly, because I was afraid of what he might turn around and do, which he eventually did.

Q. All right. Let me ask the question again: Do you remember this morning a single time when you complained to Ray Shafer about racial discrimination at East Texas? A. I remember several times. I do not remember the dates.

Q. All right. Tell me about the first time that you remember.

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[26] Q. All right. It is your testimony this morning then, that you have never made a specific complaint

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[27] to Shafer about discrimination against Mexican Americans and Negroes? A. Under the terms that you say, no.

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[29] when you specifically complained to Ezzell about racial discrimination at East Texas? A. It would be hard for me to remember, like I say, when exactly, and all of this. He would go to the terminal dock, or we would go to the union Hall, and we would bring all of these kind of complaints out. No [sic] specifically pointing a finger and saying "You are discriminating against Mexican Americans and Blacks", but we would bring to light the problems we were having there at East Texas. Many many times.

Q. Well, I would like to ask you to confine your answers to racial discrimination regarding road driver jobs at East Texas. Now, have you ever, at any time, made a complaint to Ezzell that East Texas was discriminating against Mexican Americans and Negroes, in hiring road drivers? A. You keep using "Mexican Americans and Negroes." It is very hard for me to answer.

Q. Do you remember ever having made such a complaint to Mr. Ezzell? A. I have complained that I was being discriminated against.

Q. Because you were a Mexican American? A. Because I was a Mexican American, yes.

Q. To Ezzell? [30] To Ezzell.

Q. When? A. Like I said, on numerous occasions, when he was coming out representing the union.

Q. Regarding a road driver's job, or any other? A. Regarding any other complaint we might have, or we might bring up.

Q. Let me ask you again, Mr. Perez: Have you ever made a complaint to H. E. Ezzell in which you specifically told him that East Texas Motor Freight was discriminating against Mexican Americans and Negroes in the hiring of road drivers? A. I don't know. Can I talk to you?

(Whereupon there was a discussion off the record)

Q. Did you ever go to H. E. Ezzell and complain to him that you weren't being allowed to go on the road as a road driver because you were a Mexican American. A. Yes.

Q. When? A. On several occasions when he would go over there to represent the local union.

Q. What did you tell him, exactly? A. Exactly, I do not remember. But generally it would be questions like, "How come we can't get on the road?".

[31] Q. Did you end those conversations and tell him it was because—you couldn't, because you were a Mexican American? A. Sometimes, I am sure I did, and other times, I am sure I didn't.

Q. Do you remember a single instance in which you told him that that was the reason? A. No with dates, or anything like this, but one time when he even answered what would happen if I continued to do things of this nature.

Q. Did you at one time tell him you couldn't get a road driver's job because you were a Mexican American? A. Yes.

Q. Approximately when was this? A. Approximately a little bit before the time when I got fired, in 1966.

Q. Did you ever tell him this on any other occasion? A. The exact words, no. The general statement, yes.

Q. You never did tell him on any other occasion that it was because you were a Mexican American that you couldn't go on the road? A. That kind of statement exactly, no.

Q. All right. Other than what you have told us that you told Ray Shafer and H. E. Ezzell, and the letter you wrote to Mr. Fitzsimmons, is there any other time when [32] you specifically complained to a union officer or representative that you couldn't get a road job because you were a Mexican American? A. There might have been, but I don't remember.

Q. You can't remember any this morning? Is that right? Mr. Perez, in the written questions which the local union submitted to you to answer in this case, you were asked to state each occasion and who was present when you made an inquiry about getting a road driver's job on occasions when you brought this up with the local union. Do you remember that question? A. Were you reading it, or were you just telling me about it?

Q. I am just telling you about it. A. I guess I remember it. It happened.

Q. Do you remember saying that you brought up the matter of road driver's jobs with East Texas at every local 657 meeting between April of '69 and May of '71? A. Do I remember that?

Q. Yes. A. I did not say that I brought it up at the meetings, and I did not bring it up at the meetings except once.

Q. Now, what meeting are you referring to? A. At the time when we had the regular meetings, I would discuss it with Ray Shafer.

[33] Q. You did not answer in your answers to the Union's question that you brought this matter up at every regular Local 657 meeting between April of '69 and May of '71? A. I do not know whether this was—you are saying what I am saying is that when I brought it up, I brought it up to Ray Shafer. On the dates you are asking, were the dates of the regular meetings. Because we would have either a board meeting or I would be present as an officer at the regular meetings, and I would discuss this with Ray Shafer.

Q. Well, then, is it your testimony this morning that you never made an inquiry about a road driver's job at a general membership meeting of the local union? A. Yes, I did.

Q. When? A. I do not remember the exact date, but one of these times at the regular meeting.

Q. One time you did it? A. That I remember, I inquired at a General meeting one time.

Q. All right. A. At a company meeting another time.

Q. All right. Now, at the general union membership meeting, approximately when did you bring this up? [34] A. I remember that I was sitting next to Shafer and questions were being raised about it, and then I, as an officer, asked him about it. This was in a meeting, I don't know, around—let's see. Possibly the April membership meeting.

Q. April of what year? A. 1970.

Q. All right. Is that the only general membership meeting that you can recall this morning where you brought up the matter of employees gettting road jobs at East Texas? A. You mean general membership meeting? Yes.

Q. All right. What other type of meetings did you bring this matter up at? A. There were times when Job Stewards wanted special meetings with their companies,

and at one particular East Texas Motor Freight meeting, after the regular membership meeting, this question was brought up and I had questions about it. I inquired about it.

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[43] Q. All right. Now, in your answers to the union's written [44] questions to you, you stated that in April of 1971, you went to Mr. Shafer and talked to him about a road driver's job and at that time mentioned some openings in jobs at San Antonio. Do you recall that conversation? A. Yes, I do.

Q. All right. Will you tell me first of all where that conversation took place? A. In his office.

Q. Who was present besides you and Mr. Shafer? A. In his office, no one. Right next to the office, Secretary Elizabeth Ezzell.

Q. What did you say to Mr. Shafer on that occasion about a road driver's job? A. I told him that Mr. Wes Sager had told me that there three road job openings in San Angelo, Texas, and I was asking him permission to transfer over there to San Angelo and get one of the road driver positions.

Q. You were asking Shafer's permission to transfer? A. I was asking, inquiring of him, how I could go about it, and at the same time asking him could I transfer over to San Angelo.

Q. All right. What else did you say to him? A. That was about it.

Q. All right. What did he say to you? A. He asked me who told me, and I said "Wes Sager". He [45] asked who told him, and I said, "I don't know. He told me." And he didn't say much more. He just picked up the phone and called somebody.

Q. Is that all you recall that he told you on that occasion? A. Prior to the phone call, yes.

Q. Who did he call? A. I heard him looking for Everett Cloor. Whether he talked to him, or not, I don't know.

Q. Well, did he make a call about the road drivers job for you? A. Not for me. Against me.

Q. Well, who did he call? A. He asked for Everett Cloor.

Q. Who is Everett Cloor A. As far as I know, he is a company representative.

Q. Do you know where his office is? A. In Dallas.

Q. What did you hear Shafer say over the phone on that occasion? A. That what was wrong with Wes Sager telling his man that there were road openings in San Angelo.

Q. What else did you hear him say to Everett Cloor? A. He told him after listening, I don't know what the other party said, he told him to be sure and tell Wes Sager to quit telling us this type of information.

[46] Q. What else did he say A. To forget about it, and that was it.

Q. All right. Now, on what basis or what information or what reason do you say he made a call against you? A. The reason is that Mr Wes Sager explained how this came about, how this job opening came about, and the fact that he told whoever he was talking to on the phone to tell Wes Sager to quit giving us this type of information, which I believe was good for myself, if I wanted a road job.

Q. Well, at that time did you make an application at East Texas for one of those jobs at San Angelo? A. I already had an application pending, I believe, to be a line driver. For those specific three, I was only at that time inquiring, trying to find out how I could get one of those three positions.

Q. Well, you didn't need Shafer's permission to transfer to San Angelo, did you? A. It was within his jurisdiction, yes, I believe. I am not sure, but I believe.

Q. Well, are you saying that you had to have his permission to transfer to a job at another—in another town? A. I believe so, at that time.

Q. On what do you base that option, Mr. Perez? [47] A. Well, just that whenever you are going to transfer or do anything within the union, you have got to have union permission, or something like that. That is as close as I can remember.

Q. Where did you learn that? A. Reading some magazines where you transfer from one local to another, and things of this nature.

Q. I see. And did you hear anything else that Shafer said on that occasion to Everett Cloor? A. No. He was angry and he was more or less getting after Everett to get after Wes Sager, or something like this.

Q. Did you verify in any way that there were some line driver job openings in San Angelo? A. Just the fact that I talked to the road drivers that came from San Angelo or Balmorhea, which is close by, and they told us of these positions.

Q. Men working for East Texas? A. Yes. It was the old VCS acquired East Texas lines.

Q. Now, Mr. Perez, in your complaint in this lawsuit, you complain, among other things, that East Texas keeps Mexican Americans and Black city drivers from becoming road drivers. Isn't that part of your complaint?

. . . . . .

[51] Q. Why do you feel they could have done something about it? What is your basis for that? A. If you are representing myself, and there is a position where I can better myself, I believe that if you represent me and you get me that position, if you do not get me that position, you are not representing me.

Q. Well, if East Texas Motor Freight has a policy of not hiring Mexican Americans for road driver jobs, how would local 657 have forced them to do this? A. Possibly the same way you get $5.00 and some odd cents an hour. I do not know. That is up to you to do it.

Q. Is there anything specific that you feel your local union should have done about getting you, personally, a

road driver's job and didn't do it? A. Personally, no. I believe that the doors should have been opened for road driver positions, if the member so desired.

Q. Well, have you not asked Mr. Shafer on two or three occasions to help you get a road driver's job? A. Yes. But I wasn't saying, like the way I understood your question to begin like that—I was only asking for myself. I was just asking because I was me. It was me asking. So naturally, I would be talking about myself. But the way that I talked, I mean anybody could go on the road or become a road driver.

[52] Q. Well, you asked for help for yourself in getting a road driver's job, didn't you? A. Sometimes. And other times I asked for other members of the company.

Q. Confining your attention now to just yourself, did you not expect the union to try to help you get a job? A. Did I expect it?

Q. Yes. A. I always expect the union to go try and do something.

Q. Do you know they didn't try? A. Yes.

Q. How do you know this? A. Because I never did get the road job and I would always be told differently.

Q. All right. Assume they tried and were turned down; then what should it have done? A. Why didn't they tell me about it?

Q. All right. But what should they have done about making East Texas give you the job? A. That, I cannot answer. I believe they could have done better.

Q. You feel they could have done it, if they wanted to? Is this correct? A. Yes.

Q. What is your basis for this opinion? [53] A. To begin with, I do not believe there should have been these barriers spelled out and all of that in the contracts. And once they are there, I believe that the union representing its members, should have done something about it a long time ago.

Q. That is not in response to my question, Mr. Perez? A. Well, you asked what I believed.

Q. My question to you was, what is the basis for your opinion that the local union could have made East Texas give you a road driver's job, if the union had wanted to do so? A. I don't know. I can't answer. I don't understand you.

Q. All right. Let me ask it this way; Do you not believe that if the local union could have and wanted to, it could have gotten you a road driver job with East Texas? A. Not me. You see. That is what I don't understand. You are asking exactly of me. If the policy was not there or if the contracts were not made in that way, I believe that I could have progressed within the same company. I could have advanced to be a road driver in a better paying position. By the union making this contract, and all of that, and accepting them, and agreeing to them, that is excluding me.

Q. Well, is your only complaint then, about the union, that it failed to make the right type of contract? [54] A. They failed to represent. I don't know whether the contract could have made it or not.

Q. In what way did the union fail to represent you in getting a road driver's job? A. Well, that it would not go and speak in my behalf. Either as a class or as an individual, or however the union wanted to do it.

Q. All right. Confining it to you, personally, as an individual, how has the union failed to help you get a road driver's job? A. I already stated that by the contracts they made and all of this. They agreed to it.

Q. And in what other way? A. There are many ways, and ideas in my mind, that it could have been done.

Q. Well, tell me about it. That is what I want to know? A. Well, just the fact that I am in the city and I want to transfer to the road, there shouldn't have been a transfer, or rather a no transfer thing. I mean there should have been, from the beginning—there should have been a truck driver's job.

Q. All right. Now, the union failed to represent you in getting a road driver's job. Is that not your contention in this suit? A. Getting a road driver's job. Allowing me to get a road [55] driver's job, yes.

Q. All right. In what way now, specifically, has the union failed to represent you in making it possible for you to get a road driver's job? A. Just like I already said, by the contracts. Entering into the contract that keep me in the city positions.

Q. All right. In any other way has it failed to represent you? A. By the local union representative not speaking in my behalf.

Q. With regard to a road driver's job? A. With regard to the possibility of obtaining a road driver's job, yes.

Q. All right. Do you know he did not speak in your behalf? A. Like I stated before, yes, I know he didn't. Otherwise, I would have got it.

Q. What is your reason for saying that? A. Because he said so himself.

Q. That he didn't talk to them about it? A. He just promised and never came back with an answer or anything like that.

Q. My question, Mr. Perez, to you is, how do you know that the union representatives did not talk to East Texas about your getting a road driver's job? A. How do I know?

[56] Q. Yes. A. I just know they didn't.

Q. How do you know that? What is your basis for saying that? A. Well, the contracts are still the same.

Q. I am speaking of the union's failure to talk to East Texas about you, personally, and about you, personally, getting a road driver's job, regardless of the contract? A. I keep telling you this is not for me, personally. I believe that if these barriers had not been there, I would have been a road driver years ago.

(Whereupon there was a discussion off the record)

Q. Now, Mr. Perez, one of your complaints in this lawsuit is that East Texas had a policy of not allowing city drivers to transfer to line driver jobs, without the loss of their company seniority for job bidding and layoff rights. Isn't that part of your complaint? A. It is part of the thing that was explained to me, yes.

Q. Well, you are complaining of that, are you not? A. Yes.

Q. And you do understand or believe that they have such a policy as that, do you not? A. Yes.

Q. Now, you also complained in this suit, did you not, that Local 657 had accepted this policy. Is that not [57] part of your complaint? A. Yes, it is.

Q. All right. Now, tell me briefly how local 657 has accepted this policy that you are complaining of? A. By the fact of the contracts, the way they make their contract.

Q. In any other way, has it accepted the policy? A. There might be others. I don't remember them.

Q. All right. Have you, personally, ever complained to any representative of the local about this specific policy? A. Yes.

Q. All right. To whom did you complain? A. Ray Shafer.

Q. Do you remember when? A. Many occasions, but one of the occasions would be when I inquired about the road driver position. He told me that we were bound by the city contracts—city pickup and delivery contract.

Q. All right. Now, in your answers to the questions that the union asked you, you stated that Ray Shafer and I, personally, were responsible for the union accepting this no transfer policy, did you not? A. I believe so.

Q. All right. Now, is it your contention in this suit that [58] Ray Shafer and I, as the union attorney, could have changed this policy of East Texas, which refused to let city drivers transfer to road jobs with their city seniority? Is that your complaint in this suit? A. My reason for that is because you were part of the union. Ray Shafer is a representative, and you, as an attorney, and that you could or could have not, I do not know, but I believe that you could.

Q. All right. Well, I want to understand what your complaint is, Mr. Perez. I am not trying to trick you in any way. I just want to know if you are complaining in this suit that it was the action of Ray Shafer and myself, as union lawyer, that accepted this policy of East Texas that you are complaining about? A. I would say that you are part of the complaint.

Q. In other words, you feel that Ray Shafer and I, as the union lawyer, acting on behalf of the union, accepted and agreed to this policy? A. Yes.

Q. Is that right? A. Yes.

Q. All right. Now, confining your attention first to Shafer, why do you say that Shafer accepted this policy of East Texas, which you are complaining about? A. The same reason as the contracts. He was abiding by [59] them or enforcing them, whichever.

Q. All right. Any other reasons? A. Just when he would make a statement that the company policy, you know, kept you from doing that. He was accepting it.

Q. All right. Any other reasons? A. Not that I can think of, no.

Q. Now, why do you say that I, as the union lawyer, was responsible for the union accepting this policy? A. For the same reasons. You were the union representative.

Q. And what other reasons do you have? A. That I know of, that would be all.

Q. All right. Now, what do you think that Ray Shafer should have done about changing this policy that you didn't like, which prohibited city drivers from transferring with their company seniority? A. I believe he could have made it known to the Committee which at times, I believe, he was a member, of the way that, you know, we felt toward it. And possibly in that way.

Q. And what other things do you think he should have done? A. In reference to that, I guess that's—it goes toward changing the contract—toward changing the situation.

Q. He should have done something about changing the situation of the contract? Is that right? [60] A. Yes.

Q. Now, what do you feel that I, as the union lawyer, should have done to correct this policy that you are complaining of? A. The same thing, I believe. Work with him. Help him in achieving this.

Q. Specifically what do you think I should have done? A. I do not know. Just help him do it.

Q. Help him get the contracts changed so that they couldn't enforce this policy? Is that what you are saying? A. Yes. Work with him towards eliminating the problem. As to how, I don't know.

Q. Well, what is the problem now? The fact that you couldn't transfer? A. The no transfer policy, yes.

Q. All right. Now, have you told me all the reasons that you have as to why you believe that Shafer and I, as union lawyer, were responsible for the union accepting this no transfer policy? Take your time and think if you have told me all of them? A. I don't think so. I think there were others. I could take time and still wouldn't remember, but there were still times that I believe where he could have represented us in a better way than what he was doing.

Q. With regard to the no transfer policy? [61] A. With regard to the no transfer policy.

Q. What do you recall about that? A. Statements that he made that it was company policy and he could do nothing about it.

Q. Well, my question to you, though, is what should he have done about it? A. I don't know. Worked toward changing it.

Q. Is that all? He should have changed it? Is that all you say he should have done? A. I don't know whether he could change it, himself, or not, but he could work towards changing it and eliminating it and bringing it up with the company, speaking in my behalf, and going to the company and representing me, saying, "Sadrach wants to be able

to transfer to the road," and getting answers from the company as to why not. Things of this nature.

Q. Is there anything else you feel he should have done to change this policy? A. Well, I feel that there are many things, but I cannot just remember, you know, or say. I don't know how he would go about it. I just mean that he could have done something about it.

Q. He could have and should have done something about changing the policy? A. I believe so.

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[67] Q. Did you ever hear any other member complain to me, personally, Mr. Perez? A. Not that I remember.

Q. Now, you complain in this suit that the no transfer of seniority policy is a product of certain sections of the collective bargaining agreement between East Texas and the Southern Conference, do you not? A. I think so.

Q. All right. What section of your collective bargaining agreement provides that you cannot transfer your city seniority to a road driver's job, Mr. Perez? A. I don't know what section.

Q. Does the contract say that? A. I know that it has two different—it defines a road driver and a city driver.

Q. Now, you also say that the local union has accepted this no transfer seniority policy as a product of the bargaining agreement. Is that not part of your complaint? A. I believe so.

Q. And in your answers to the union's questions, submitted to you in this case, you said that they accepted it by abiding by the two contracts. Do you remember that answer? A. Uh huh.

[68] Q. What did you mean, or do you mean, by "abiding by the two contracts"? A. By accepting this, by having two different contracts, and going under contract with the company under two different contracts like that.

Q. What do you feel that the union should have done

with reference to changing that policy? A. I believe it shouldn't be there. I do not know what the union could have done to change it, except that negotiate contracts without it.

Q. All right. How many employees of East Texas in San Antonio have made applications to transfer to road driver jobs, that you, personally, know of? A. Three, besides myself.

Q. Who are the three besides yourself? A. Modesto Herrera, Jesus Rodriguez, and Trinidad Gomez.

Q. That is all you know that have made applications to transfer? A. That is all that I know of, yes.

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[86] Q. You told Shafer at that time you were filing a charge against the union? A. Yes.

Q. For what reason? A. The reason that we were not allowed to go on the road and things of that nature.

Q. Where were you when you told him this? A. In his office.

Q. All right.

(Whereupon the deposition recessed at 12:00 o'clock, noon, and reconvened at 2:00 o'clock, p.m., at which time the following proceedings were had)

CONTINUED DIRECT EXAMINATION

QUESTIONS BY MR. PENSHORN:

(Whereupon local Exhibits A, B and C were marked for Identification)

Q. Mr. Perez, in paragraph 8(b), or, excuse me, correction. Paragraph 8(a) of the complaint which you have filed in this suit, you make the complaint that Local 657 has accepted an acquiesced in the discriminatory [87] conduct of East Texas Motor Freight and the Southern Conference, despite numerous requests for assistance by plaintiffs, and

members of their class. Do you remember that particular part of your complaint in this suit? A. Yes.

Q. All right, sir. Now, I want to call your attention to that part of what I have just read, which says "Despite numerous requests for assistance by plaintiffs and members of their class." Now, the class, as I understand, that you are attempting to sue for in this case is all Mexican American and Negroe city drivers working for East Texas in the State of Texas. Is that the class that you are bringing this suit on behalf of? A. The actual papers, the way it is prepared, and all of that, was not prepared by me. My suit is there is discrimination against Mexican Americans and Blacks by East Texas Motor Freight.

Q. But my question is, you understand, do you not, that you and Mr. Herrera and Mr. Rodriguez are bringing this suit not only for yourselves, individually, but for all Mexican American and Negroe city drivers of East Texas in the State of Texas. Is that not your understanding of what you are doing? A. I am not sure that I understand, for the reason that I filed against East Texas Motor Freight and East Texas [88] Motor Freight has many states, covers many territories, or jurisdictions, or whatever, and also the union.

Q. Well, this deals with who you have brought the suit against, what I am asking you is, is it your understanding that you have brought this suit on behalf of certain minority groups as a class? A. Yes.

Q. All right. What class, as you understand it, does that include? A. That class that is Mexican American and Negroe, that is employed by East Texas Motor Freight. That is applied to East Texas Motor Freight.

Q. All right. Now, aside from yourself and Mr. Moe Herrera and Mr. Jesse Rodriguez, how many other people in this class that you have just described, have you heard ask for assistance by Local 657 in eliminating racial discrimination? A. I have not heard anybody exactly say it

They were involved, because they were in the same type of situation as I was, or am.

Q. But my question to you, though, is have you heard anyone make a request or complaint, either, to any representative of Local 657 about racial discrimination that worked for East Texas Motor Freight? A. Locally, I have heard several people inquire, yes.

[89] Q. All right. Who did you hear inquire, first of all? A. People—members in other freight lines.

Q. All right. Now, that is not part of the class you are representing, though, Mr. Perez, you are only representing East Texas Employees, are you not? A. I already named the four, and I said there were about six that came to me and said so—and actually complained. Others just talked about it.

Q. All right. My question to you is this: I want the names of the people in this class that you have heard make complaints about racial discrimination to Local 657? A. The names that I already mentioned.

Q. Who are they? A. Moe Herrera, Jesus Rodriguez, Trinidad Gomez, and Lupe Morales.

Q. Lupe who? A. Lupe Morales.

Q. Who else? Anyone else? A. There is a couple of others, that I am sure, but I don't know their names.

Q. Does Trinidad Gomez work for East Texas Motor Freight? A. As far as I know.

Q. He did when you left there? A. Yes.

[90] Q. What about Lupe Morales? Does he work for East Texas Motor Freight? A. He worked for East Texas Motor Freight.

Q. All right. When did you hear Trinidad Gomez make a complaint to a representative of the local union about racial discrimination? A. Well, to begin with, he complained to me several times, and I would, in turn, take and complain to Ray Shafer with Local 657.

Q. What did Trinidad Gomez say to you? A. Different occasions, different things. What I can remember is that,

"how come we are not allowed to go on the road?" We would have general discussions, and long talks, regarding why we Mexican Americans were not on the road. Why the company did not allow us to use the road equipment and things of this nature.

Q. All right. On how many different occasions did he talk to you about this, as much as you can recall? A. On several occasions.

Q. Did he ever specifically complain to you that East Texas was discriminating against Mexican Americans? A. Yes.

Q. Exactly what did he say in that regard? A. Something similar to what I have already said. (speaking in Spanish) that this SOB, or something like that, in [91] reference—this is as close as I can get to it myself—meaning that the company did not allow us to go on the road. They were mistreating us by doing this. They were being mad to us.

Q. All right. Anything else he told you? A. I don't remember what else, but in general discussion we just talked back and forth.

Q. What about Lupe Morales? What did he say about the company? A. Ever since he started working for East Texas Motor Freight he would like to have a job as a road driver, but nothing, and hearing all over that this was not possible, he just didn't even bother to ask most of the time, but he was asking me.

Q. Did you ever hear him complain to any officer or representative of Local 657? A. He told me several times that he discussed it with one of his friends, or compadres, who is a union officer. What he might have said or what, no. He just generally said he was dissatisfied with the fact that he could not go on the road.

Q. But at any rate, you have never heard either Trinidad Gomez or Lupe Morales complain to any other union officer or representative? Is that right? A. Other than myself, no.

[92] Q. All right. And this was the time when you were

an officer of the local union? Is that right? A. And I would relay the message to the local.

Q. Who did you relay it to? A. Ray Shafer and the Board, one time.

Q. On both occasions? A. Same occasion that I am talking about.

Q. You told them about both men at the same time? A. Yes. I used the term, I believe, "several employees of East Texas Motor Freight."

Q. All right. Are there any other members of this class that you are bringing this suit on behalf of, whom you have heard make requests for assistance of the local union? A. I haven't heard any.

Q. This is all? A. I heard their complaints myself, but I didn't hear them tell another member of the union.

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[95] Q. There have been meetings called for the purpose of finding out what the employees of East Texas and other freight lines to be affected by the contract want. Is that right? A. Yes.

Q. All right. Now, have you attended some of those meetings? A. Yes.

Q. All right. Now, at any of those meetings, Mr. Perez, have you, personally, ever requested that a demand be submitted for a single contract for road [96] and city drivers working for East Texas Motor Freight? A. Not in those terms, no.

Q. And in what terms have you spoke about it? A. Questioning about the road, the pay, the advancement and things of that nature.

Q. You have never made a request that one contract be negotiated for all road and city drivers of East Texas? Is that right? A. Right.

Q. Have you ever heard any other employee of East Texas at any of those meetings made such a request?

Q. No. Your answer is no? A. No.

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[98] Q. All right, sir. So you, personally, have never made a request or tried to make a request that in the contract with East Texas you be permitted to carry your city seniority to a road job, have you? A. Not like you say it, no.

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[99] Q. All right. Did you ever at any of these contract negotiation meetings get up and state or request that the union not negotiate separate contracts for road and city drivers? A. No. For the same reasons.

Q. Did you ever hear any other person at one of those meetings make such a statement? A. No.

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[110] Q. All right. Now, again directing your attention to the meetings, Mr. Perez, which you attended which were called for the purpose of voting upon the contract proposals, I direct your attention just to that. I would like to ask you if at any of those meetings that you attended, you ever heard anyone get up and complain about there being separate contracts, or proposed separate contracts for road and city drivers? A. Not that I remember.

Q. At any of those meetings, at which they submitted the proposed contracts to you to vote upon that you attended did you ever hear any one get up and complain about not being able to transfer to a road job and carry your company seniority? A. In those terms, no.

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[224] Q. To the best of your recollection, at what point in time did they stop telling you that they didn't allow city drivers to transfer to the road? A. I do not remember exactly.

Q. I know. I don't expect you to. A. At first, the thing was that we just couldn't. Later on, I don't know, maybe '66 or '67, they started changing: "You have to go apply in Dallas, and do it this way and that way."

Q. Did you ever apply in Dallas? A. No. They were never specific. They asked—we asked how to get applications. And I keep saying "we". But most of the time it was done in groups, or prior to meetings, like that.

Q. You never sent a letter to Dallas? A. Mr. Sager, Wes Sager, said he was going to send this letter.

Q. Was this in 1970, just prior to the time you signed that letter? A. I believe it was in 1970, yes.

[225] Q. What was the context? What were the circumstances that resulted in this letter that is attached to your deposition as Exhibit A?

MR. HEIDELBERG: To clear my own mind, it hasn't been attached, yet.

MR. WEISS: It is attached to the answers to the interrogatories.

MR. HEIDELBERG: Oh, yeah. I thought you were talking about the deposition.

A. I did not understand that, would you repeat it?

Q. What was the situation—what were the circumstances that came about that you ended up signing the letter that is attached to your answers to the interrogatories about applying for a road driving job with the company? A. I had been after a road driver job for many, many years, and finally I just more or less got fed up with being told "No" and I wanted to make it more or less official, or something like that, other than just verbally asking and getting nowhere. And I wrote out a little note to Mr. Wes Sager telling him that I wanted him to provide me an application to apply for a road job. He said I had already applied when I first started working there. And I said, "well, I want to reapply again, or whatever it takes. I want a road driver job." I explained to him they paid better. I explained to him [226] that I would be willing to transfer. You know, he would ask me also at this time, and we discussed it and finally he said that he couldn't do it. And I handed him the

note that I made, and then later on he called me back, about two hours later, and he already had a printed letter stating, you know—you know, the one that is attached there, and I signed his copy and I signed my copy.

Q. Were you present when Mr. Rodriguez signed his copy? A. No.

Q. Do you recall the circumstances that resulted in Mr. Rodriguez signing his copy? A. I do not know exactly. I heard them discuss it later that he was called into the office, I believe. I was not there. I don't know how he got his.

Q. Did Mr. Lopez sign a copy of the letter?

MR. HEIDELBERG: Who is Mr. Lopez?

MR. RISSETTO: Somebody he referred to.

Q. No. Trinidad Lopez.

MR. HEIDELBERG: Gomez.

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[243] Q. I will call your attention to what has been introduced as East Texas Exhibit A, and ask you to look at this. This is the application form. I will ask you to look at this and I will bring your attention to a section appearing on the first page of this document, which is entitled "lineage" and ask that you read what is—what you printed in that second when you applied? A. "Latin American".

Q. Well, you agree with me that it also indicates, evidently printed by the company, "English, Irish, French, Hebrew, German, etc." A. Yes, I saw those. That is the reason I distinguished "Latin American".

Q. Drawing your attention to East Texas Exhibit B, which is a copy—a four page copy of an original petition that was filed in Bexar County, Texas, with yourself as the plaintiff and National Surety Corporation as the defendant, did you have anything to do with the actual writing of this particular petition? A. No, sir.

Q. Who did. A. I believe Mr. Ed Penshorn.

Q. Mr. Penshorn was your attorney? A. Yes.
Q. For this purpose.

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[Deposition of Jesse Rodriguez]

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[5] Q. Now, prior to April of '65 for whom did you work, Mr. Rodriguez? A. Prior to April of '65?
Q. Yes. A. Tiner Dairies.
Q. How long did you work for Tiner Dairies? A. Oh, approximately around a year or so.
Q. What type of work did you do for them? A. I was a driver.
Q. Truckdriver? A. Yes, sir.

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[6] Q. Mr. Rodriguez, in your complaint in this lawsuit, one of the things you complain of is East Texas has a policy excluding Mexican American and black city employees from Line Driver jobs. Is that right? A. Yes, sir.
Q. Now, how did you learn that East Texas had such a policy as this? A. It was by word of mouth from the company.
Q. When was this that you first learned of it? A. I really can't recall the specific date or the month, but it was sometime between February of '70 through August of '70.
Q. Who told you that the company had such a policy? A. To the best of my recollection, I believe it was Bierele.
Q. Is he an employee of East Txas Motor Freight? A. At this time he is the Assistant Terminal Manager.
Q. At the time he told you this, was he an employee of East Texas? A. Yes, sir.
Q. What was his position at that time? A. I don't know if he was Assistant General Manager, but at [7] that time he was a foreman.

Q. At the time he told you this? A. Yes.
Q. And this was sometime between April and September of 1970. A. Yes, sir. Sometime between that time.
Q. Can you pinpoint the date of this conversation any better than within that period between April and September of '70? A. Not really. I would like to try, but I would be guessing. I know it was in between that time.
Q. All right. Now, where did this conversation between you and Mr. Bierele take place? A. There at the Terminal at East Texas.

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[8] Q. And what was the reason for your approaching him to talk to him? A. Well, East Texas was about to purchase VCS.
Q. What is V-C-S, Mr. Rodriguez? A. Valley Copper State, which is a freight line.
Q. All right, sir. Go ahead. A. And they had drivers here in San Antonio, based here—Line Drivers. And I was interested in such a position and therefore, I inquired about the possibility of such a job.
Q. All right. And what did Mr. Bierele tell you in response to your inquiry? A. Well, I can't recall the exact words, but—I really can't recall his exact words.
Q. Well, as best you can recall, tell us what he said? A. Well, something about the no transfer policy, I believe. The city drivers not being able to transfer.
Q. Did he say anything else on this occasion? A. Not that I can recall.

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Q. So your only basis for complaining to that effect in this lawsuit is the fact that you haven't seen any from other terminals come to San Antonio in tractor/trailers?
[9] excluding Mexican-Americans and Negroes from Line Driver jobs? A. What caused me to complain?
Q. Yes. As a result of that conversation. A. Well, to the best of my knowledge, I don't know of East Texas ever hir-

ing Mexican-Americans, or Blacks, on the road positions, and I felt that I was being kept out from such a job because of my race.

Q. Why do you that East Texas has never hired Mexican-Americans or Negroes for road driver jobs? A. Well, to the best of my knowledge, I have never heard of any.

Q. Well, what is it that you know about their operation that causes you to conclude that, Mr. Rodriguez? A. The Line Drivers that come into our terminal are all Anglos.

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Q. Has anyone ever told you that East Texas has a policy of excluding Mexican-Americans and Negroes from Line Driver jobs? A. No.

Q. So your only basis for complaining to that effect in this lawsuit is the fact that you haven't seen any from other terminals come to San Antonio in tractor/trailers? [10] A. No, sir. That is not my only basis.

Q. What is the rest of your basis for making this complaint? A. There are two separate contracts for city drivers and road drivers.

Q. All right, sir. Anything else? A. The no transfer policy by East Texas Motor Freight.

Q. All right, sir. Any other reason why you make this particular complaint? A. Also, the reason that I think that these two policies tend to exclude Mexican-Americans and Blacks from such positions.

Q. Well, why do you say that these two policies tend to exclude them from such jobs? Why do such policies do that, in your mind? A. In my mind, the Union and the companies negotiate two separate contracts, and it is my belief that these two contracts regulate the Mexican-American and Blacks to lower, more physical and hazardous work, as lifting heavy materials and working at strenuous work in the cities. They allow the Anglos to drive, and much less strenuous work on the road with better pay.

Q. Has East Texas Motor Freight ever had any line

driver jobs at the San Antonio Terminal, since you have been working there? A. No.

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[11] Q. Mr. Rodriguez, I believe that you have stated that you talked to Ray Shafer about getting a job as a Line Driver with East Texas Motor Freight. Is that correct, sir? A. Yes, that's correct.

Q. And on how many different occasions did you speak with Ray Shafer about such a job? A. That I can recall, approximately about three times.

Q. All right. And when was the first time that you spoke to him about such a job? A. To the best of my recollection, the first time was on or about February of '70?

Q. Where did this conversation take place? [12] A. At the Hall.

Q. What Hall? A. Local 657.

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[13] Q. But at any rate, is it correct to say, Mr. Rodriguez, that this meeting was called by the employees of East Texas to discuss a number of problems with the Union that [14] the men had at East Texas Motor Freight? A. It wasn't problems. It was just mainly they wanted information as to when it would be final, the merger, and things like that.

Q. I see. Well, in other words, you had heard that East Texas was going to buy another freight line and you and other members wanted some information concerning this? Is that correct? And the merger. A. That, and we were interested in road jobs.

Q. All right. Now, at that particular meeting, which I believe you stated was in February of 1970, or approximately that time—is that correct, sir? A. Right.

Q. Did you, personally, speak to Mr. Shafer in this meeting? A. Yes.

Q. What did you say to him? A. The exact words I can't remember, other than I asked him to—that I was interested in going on the road.

Q. As a Line Driver? A. As a Line Driver.

Q. When? Did you mean immediately, or after they bought out this other company? A. I wasn't interested in the time, Mr. Penshorn, I was just interested in getting it.

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[15] Q. All right. What did Mr. Shafer say to—in reply to your statement? A. The best I can recall is that he said he would look into it.

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[16] Q. Now, after that meeting, did you ever have an occasion to ask Mr. Shafer what he found out about your getting a Line Driver's job? A. I believe that I had occasion to run into him at East Texas and I asked him about it again. And he might have brought up the subject of no transfer policy that East Texas had.

Q. He might have? Is that your answer? A. Well, I think he did. I remember him saying that—a couple of things about East Texas having this policy and that he had looked into it and he couldn't tell the companies who to hire.

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[19] Q. All right. Now, when was the next and third time that you talked to Shafer about getting a Line Driver's job? A. Again it was there at the terminal. He was there, I guess on business, and it was after that again. After that second meeting there that I ran into him there.

Q. Approximately how long after the second meeting? A. Well, it was fairly close—just prior to my filing the charge. I don't remember the specific month or the date.

Q. Only you and Shafer were present at that time? A. That's correct.

Q. All right. Now, exactly what did you say to Shafer on that third occasion? A. That I was still interested in such a position.

Q. Meaning what? A. That I still wanted to go on the road.

Q. As a Line Driver? A. That's right.

[20] Q. Did you mean by this, any place that you could get such a job? A. Yes, I guess so.

Q. All right. Excuse me, go ahead. A. When you said "anyplace", I assume you are talking about East Texas?

Q. Yes, sir. A. All right.

Q. Did you say anything else to him on this third occasion that you talked to him about getting a Line Driver's job? A. No. The same. It was the same. I still made the same request that I still wanted to go on the road.

Q. That is all you said to him? A. To the best of my recollection. In general, that is more or less what I said.

Q. All right. Exactly what did Mr. Shafer say to you in reply? A. To the best of my recollection, I believe that he said that because—well, basing what he said before and what he said between was that he couldn't make, you know, East Texas hire people.

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[21] Q. Mr. Rodriguez, haye you ever heard any other em-
[22] ployee of East Texas Motor Freight Line complain to Ray Shafer that the company was discriminating against Mexican-Americans and Negroes? A. No.

Q. Have you ever heard any other employee of East Texas Motor Freight Lines complain to any representative of the Union about East Texas discriminating against Mexican-Americans and Negroes? A. Have I ever heard?

Q. Yes, sir, you, personally. Have you ever heard any other employee make this complaint with any other representative of the Union? A. No, sir.

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[23] Q. All right. Now, you have never complained to any local representative about Mexican-Americans and Negroes not being in these jobs, and you have never heard any other employee of East Texas make this complaint to any union representative. Why do you say that the union should have gone to the company and made this demand? A. Because they negotiated two contracts with East Texas.

Q. Any other reason? A. Because the union should have seen that Mexican-Americans and Blacks should have been placed on the road, whether I have heard this complaint or not.

Q. Why do you say that? A. Because if the Teamsters was aware of the no transfer policy, they should have done something to affect whether this policy could be changed to allow Mexican-Americans and Blacks on the road.

Q. When you refer to "Union", are you referring to Local 657? A. Yes. That is the one that represents me down here. This is the one I am concerned with.

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[26] COURT REPORTER: "Q. Mr. Rodriguez, another one of your complaints in your lawsuit is that East Texas has a policy of not allowing City Drivers to transfer to Line Driver jobs, without loss of company seniority for job bidding and layoff rights. Is that not part of your complaint in this suit?" A. That is right.

Q. All right, sir. Now, in your answer to the Union questions that were asked of you, you said that the Union hadn't taken any action to remove this policy. Was that your answer? A. Yes, that's my answer.

Q. What action did you want the union to take? A. Well to see to it that the employees would have the right to transfer without loss of seniority and bidding and so on.

Q. Did you, personally, ever make the request like this of anyone in—representing the Union? A. No.

Q. Did you ever hear any other East Texas driver do it?

[27] A. No.

Q. Have you, personally, ever made any complaint to Local 657 that this no transfer policy discriminated against Mexican-Americans and Negroes, Mr. Rodriguez? A. Have I personally made the complaint?

Q. Yes, sir. A. No, sir.

Q. Have you ever heard any other East Texas driver do it? A. No, sir.

Q. Have you ever heard any Union member make such a complaint to a representative of the Local? A. No, sir.

Q. Mr. Rodriguez, one of your complaints in this lawsuit is that Local 657 has accepted the policy of East Texas in keeping Mexican-Americans and Blacks from Line Driver jobs. Is that correct?

Q. And I believe that you stated in answer to the Union's questions submitted to you as to how they had accepted it, you stated by not going to the company and asking them to put Mexican-Americans and Blacks in these Line Driver jobs. Was that not your answer? A. Yes.

Q. Is that the only way that Local 657 has accepted this policy that you are complaining about? A. No.

[28] Q. How else? A. By signing two separate agreements for Road Drivers and City Drivers.

Q. How else? A. I guess that covers it.

Q. All right. Is it your contention in this suit that this is all the fault of Ray Shafer? A. It is the fault of the person responsible for signing that contract.

Q. Anyone else? A. I would assume that it is the fault of the Conference also, since we are under the Conference.

Q. You mean the Southern Conference of Teamsters? A. Right.

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[39] Q. Mr. Rodriguez, do you know of any white city driver who worked at the San Antonio Terminal of East Texas who transferred to a road driver's job? A. White city driver that transferred here to San Antonio to the road?

Q. To a road driver job anyplace with East Texas? A. But he originally worked here?

Q. Yes, sir. A. No, sir. I don't know of any.

Q. Do you know of a white city driver working for East Texas anyplace who transferred to a road driver's job? A. I heard of one.

Q. What did you hear? A. That he had transferred to the road and that his father had been on the road for twenty years, and they made a good team.

Q. Where was this man working at the time he transferred? A. I believe it was Dallas.

Q. For East Texas Motor Freight? A. Yes, sir.

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[40] Q. From whom did you hear this? A. Company magazine.

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Q. All right. Do you know of any road drivers or line drivers who have been hired by the management of East Texas in San Antonio? A. No. I haven't heard of any.

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[41] Q. All right. Now, that would mean that there has been two contracts negotiated between the Union and East Texas since you have been a member of the Union? Isn't that right? A. That's right.

Q. All right. Now, are not the freight drivers who are covered by these contracts not called into a special meeting prior to the negotiation of the contract to find out what they want in the new contract? A. I see what you mean. You were leading to that before. This is done, but the way I understood your question before was they brought East Texas personnel only. This is the way I understood your first question.

Q. I see. What is your answer now? A. Well, we do hold a special meeting or a meeting, or whatever you call it, prior to a contract.

Q. And who attends those special meetings? [42] A. Well, the whole membership. Not just East Texas.

Q. The whole membership of the Union, or just the membership to which the contract will apply? A. I would think that it was all the members of the local that the contract is going to apply to.

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Q. Well have you attended such of these special meetings? Have you attended any of these special meetings you were telling us about that were called prior to negotiations? A. Yes.

Q. You have? How many have you attended? A. Since there have only been two, I have been there when they negotiated the contracts, so I have been there——

Q. ——twice? A. Yes.

Q. Let's get it straight. You have attended two of these special meetings? A. Right.

Q. That have been held by your Local Union to find out what the members want in their new contract? Is that right? A. Right.

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[43] Q. Now, the first of these meetings which you attended, [44] did you, personally, ever ask that the City Drivers be given the right to transfer to the road with their city seniority? A. At the first meeting, no.

Q. Did you hear anyone else make such a request? A. No.

Q. Your answer is what? A. No.

Q. At this first contract negotiation meeting that you attended, and incidentally, when was that? A. I think it was in '67.

Q. '67. A. I think so.

Q. All right. It was before that contract went into effect. A. Yes.

Q. At that meeting, did you personally request that one contract be negotiated for City and Road Drivers? A. No, sir.

Q. Did you hear anyone else make such a request? A. No, sir.

Q. At that first contract negotiation meeting that you attended, did you, personally, make any complaint about the contracts' discriminating against Mexican-Americans and Negroes? A. No, sir.

[45] Q. Did you hear anyone else make such a complaint? A. No, sir.

Q. At that first meeting, did you personally request any changes whatsoever in the new contract? A. No, sir.

Q. Did you hear any changes that you can remember that wert made by other members? A. No, sir, I can't.

Q. Now, after that particular contract was negotiated, Mr. Rodriguez, was it not brought back to the same employees to vote on to see whether they approved it? A. Yes.

Q. And did you attend that ratification or vote meeting? A. Yes.

Q. Did you vote for the contract that was submitted to you? A. Yes.

Q. Do you remember anyone voting against it? A. Well, no. I can't remember.

Q. Do you remember anyone complaining about any of the terms in the proposed contract that was brought back to you to vote on? A. No.

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[46] Q. And that would be the contract that you are presently working under, would it not? A. That's correct.

Q. When was the contract negotiation meeting held? A. I don't remember the day, but it was in '70.

Q. Do you know the terms of the present contract—the date it begins and ends? A. I think they extended it from its usual termination date which was sometime in April, to July. So it will terminate in July.

Q. Of which year? A. '73.

Q. '73? And do you know the month and year that it began? A. Well, let's see. The old contract terminated around April of '70 and I believe they didn't sign a contract until sometime in July, or around there, or in between that time. April and July. I don't have access to that information. I don't know when they signed it.

Q. Well, it is a three year contract, is it not? A. Yes.

Q. The current contract you work under? A. Yes.

Q. And it extends approximately from April of '70 to [47] April or May of '73? Isn't that about right? A. Well, I actually believe it was going to end in July of '73.

Q. All right. April of '72, maybe July of '73. Approximately three years? A. Yes.

Q. Now, before that contract was signed between the company and the Union, there was a meeting at which all of the East Texas employees were asked to attend for the purpose of finding out what they wanted in that contract, wasn't there? A. Uh huh.

Q. Did you, personally, attend that meeting? A. I attended one where they—where the Local had presented to us a contract and asked us to vote on it.

Q. That was for the purpose of voting on it? A. Yes.

Q. But before that, before the Union even started negotiations, didn't you have a meeting of the East Texas and other freight line employees to find out what you wanted in this new contract? A. There might have been. I don't recall attending one.

Q. You did not attend it? A. No, sir.

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[48] Q. All right. Well, is it your testimony that you did not attend the meeting of the employees at which they gave what they wanted in the new contract that you are now working under? Is that your testimony? A. Yes. I believe so. I believe that is my answer, because I did attend a meeting, but it was just—the Union was recommending to us a contract offer. I remember attending that meeting.

Q. This was only to vote, though, on the contract? A. I believe so.

[49] Q. When was that meeting? A. I don't really recall.

Q. What year? Do you remember what year? A. It was in '70.

Q. To vote on the offer that the companies had made? A. Well, we didn't actually vote at that meeting. I think they discussed it. I think there was a ballot mailed to our

homes and then we voted and mailed that ballot into Washington.

Q. Did you vote against it? A. Yes.

Q. Why. A. Well, I remember when we discussed it, there at the Hall, I didn't particularly care for the contract. They were offering $1.10 and Chicago was staying out for $1.89, or something like that. And I figured we should have stayed out with our brothers.

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[50] Q. Did you have any other objection to the contract that was presented to you that you were going to vote on? A. Well, no. That's all.

Q. Did you voice personally any objections to that contract that—proposal that was submitted to you at that Union meeting? A. No. I didn't voice any objection out loud, or anything.

Q. Did you hear anyone else voice any objections to it? A. No.

Q. And the only reason you voted against it was because the drivers in Chicago were holding out and you felt that you should too? Is that right? A. I thought I should stay out with them too, since we were brothers.

Q. Now, Mr. Rodriguez, in order that I am sure that I understand your testimony, I want to ask you if you, personally, have ever asked any representative of Local 657, or told any representative of Local 657 that you wanted one contract negotiated for City and Road Drivers? A. No, I didn't.

Q. Have you ever heard any other Union member make such a request or demand of any representative of Local 657? A. No, sir.

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[51] Q. Have you ever contacted, either verbally or in writing, anyone in the Southern Conference of Teamsters of the complaints that you are making in this lawsuit? A. No.

Q. Have you ever contacted, either verbally or in writing, anyone in the International Brotherhood of Teamsters about any complaint which you are making in this lawsuit? A. No.

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[54] Q. Mr. Rodriguez, I hand you what has been marked as East Texas Exhibit A. This is your application for employment to East Texas Motor Freight? Is that correct? A. Yes, sir.

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Q. Now, this application is dated August 24, 1965, is it not? A. Yes.

Q. And this was the only application you have ever filed for employment with East Texas. That is correct, is it not? A. I don't know if you would consider this an application, [55] but I was given a letter stating that they would consider me for the road.

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[59] Q. Now, from the hesitation in your answer, I gather that perhaps you have driven over the road for somebody other than a truckline. If so, please tell us about that. A. For Dentler-Facs.

Q. For Dentler-Facs? A. Yes, sir.

Q. When did you work for Dentler-acs? A. Sometime from June of '70 to around April of '71.

Q. And was that while you were on layoff status from East Texas? A. Yes, sir.

Q. And your job at Dentler-Facs, which is a snack food company? A. Yes, sir.

Q. Potato chip and corn chip company here in San Antonio? [60] A. Yes, sir.

Q. You did drive the tractor and trailer over the road? A. Yes, sir.

Q. Was it a ten gear tractor? A. Yes, sir.

Q. Was that all you did for Dentler-Facs? A. Yes, sir.

Q. And where did you travel? Where did you go? A. From here to Houston.

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[85] Q. Okay. All right. You have told us that the first time you became interested, or the first time you told the management of East Texas here of your interest in Transferring to a road job was sometime in 1970 at about the time of the merger with VCS? A. Yes, sir.

Q. Prior to that time, you hadn't given any consideration to trying to get a road job? Is that correct? A. Yes, sir.

Q. Now, of course, you knew there were no road drivers stationed in San Antonio. That's correct, is it not? I mean up to the time of the Copper State Merger? A. Right. I knew that.

Q. And you, of course, didn't want to move away from San Antonio, being a native here and having a home and family here? Isn't that correct? A. No, sir. That had nothing to do with me not asking before.

Q. Why didn't you ask before? A. I wasn't interested before.

[86] Q. Why did you suddenly become interested? A. Because of the possibility of becoming a road driver.

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[88] Q. All right. So you say you went to Mr. Bierele and said you were interested in transferring to a road job? A. That's correct.

Q. All right. Now, I want you to detail that conversation to us, as nearly as you can remember it, giving the exact words that you and Mr. Bierele used, and if you can't do that, just the substance of what you said and what Mr. Bierele said. Just start at the beginnnig and detail it to us. A. Well, like I said before, I can't remember the exact words, but the subject involved was that I wanted to go on the road, and Mr. Bierele brought out that——

Q. What did he say? A. That East Texas had no transfer policy.

Q. All right. What did you say? A. I mentioned about the merger and if there was any possibility for me to go on, because of the line drivers they had here.

Q. What did he say? A. That he didn't know what East Texas was going to do after the merger; that he couldn't answer.

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[90] Q. Well, you say the first conversation was in approximately February, 1970. Now, how long after that was the second conversation? A. Well, sometime, I guess, between or around June, or around there. That time.

Q. Around June of 1970? A. Around that time.

Q. Here again, tell us what you said and what Mr. Bierele said. A. That I told him in general that I was still interested [91] in going on the road and that is the time that he mentioned.

Q. What did he say? A. That East Texas had a hundred drivers laid off, or something like that.

Q. A hundred drivers laid off. Now, did he tell you that when the merger occurred, the Valley Copper State employees merged their seniority into East Texas? In other words, the seniority they accumulated with Copper State remained in effect with East Texas? A. Yes.

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[97] Q. Well, let's see. The Terminal Manager back in 1970 was Sager. That's correct, is it not? A. Mr. Wes Sager.

Q. Did you have any conversation with Mr. Sager about transferring? A. Yes, sir.

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Q. Mr. Sager called you in? A. Right.

Q. Tell us what he said and what you said? A. Well, he just said that Ezra had told him I was interested in a road driver's job and he had a letter there typed saying that because of my qualifications and so on that they would consider me for an on the road job, and he asked me to sign the letter for him in his office, and I signed it and he signed it.

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[98] Q. All right. Now, this is dated. Follow this with me. This is dated August 21, 1970, addressed to Mr. Sager as Terminal Manager of ETMF Freight System here in San Antonio, signed by you, and in the letter you say, "This is to advise that I, Mr. Jesus Rodriguez, Jr., employed as a City Pickup and Delivery Driver, San Antonio Terminal, am applying for a road or a line driver job of this date with ETMF Freight System. I fully realize that if I am accepted as a road of line driver I will lose my City Seniority from the date of my employment, which is September 21, 1965. I feel like my city driving record will more than speak for itself and that I am fully qualified to fulfill the duties of a road or line driver for ETMF Freight System." That's the letter is it not? A. Yes, sir.

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[127] Q. Okay. Were you aware at that time in time that East Texas didn't have a road operation in San Antonio? A. No, sir. I wasn't aware at all.

S. Did you ever come to—— A. Aware that they what?

Q. That were not running road drivers out of San Antonio. A. Oh. No. I wasn't aware.

Q. So what was your understanding that you were applying for? A. When I——

Q. ——filled out the application? A. Truckdriver.

Q. City or road? A. At the time, to be very honest with you, city.

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[130] Q. When did they give you your first driving test at East Texas? A. They never did.

Q. They hired you straight off without a driving test? A. Yes.

Q. Did they subsequent to your employment, give you a driving test? Do you recall the first one they gave you? A. I think the first driving test I had was this year. The mechanic took me out on the road tractor and took me around the block. I was driving and he was sitting there with me.

Q. And that was really your first recollection of—— A. Of a driving test at East Texas. That was this year.

Q. In other words, what you are saying is—I just want to get this clear—that they really didn't have a formal qualification? You didn't have to qualify out on a ten gear or fifteen gear and straight truck? A. No. In fact, I don't know of any company that ever did.

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[134] Q. What kind of—you stated you made your first application for transfer in 1970 for road driving? A. Uh huh.

Q. At that point in time how much experience did you consider yourself as a skilled handler of road equipment at that point in time? A. At that time I had driven enough in the city. I had driven enough trailers and stuff like that, and I [135] considered myself able to handle anything and still feel that way.

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[138] Q. Was the VCS merger—how did that relate to that period of layoff that you were on? A. Well, we had a lot of men on layoff.

Q. As a result of VCS? A. Well, I can't say it was because of VCS. We had just merged and we had a layoff.

Q. Was there a VCS Terminal in San Antonio? A. Yes.

Q. And there was an East Texas terminal in San Antonio? A. Yes, sir.

Q. What happened to them after the merger? A. They moved into our terminal with us.

Q. Did they dovetail in? A. No. They——

Q. ——they blended? In other words, they brought in their old seniority date from the other terminal? A. Right.

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[143] Q. Okay. Would you be willing to transfer anywhere in East Texas' system for a road driving job? A. I think if they offered me a list of the possibilities, instead of just saying, "you are going to go there", that way, I mean, I want to consider it that way.

Mr. Weiss: He hasn't answered your question.

Court Reporter: "Would you be willing to transfer anywhere in East Texas' system for a road driving job?" A. Yes.

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[145] Q. What companies operate domiciled road drivers in San Antonio? A. What companies?

Q. Yeah. A. The only one I know of is Leeway.

Q. Have you ever applied to them for employment? A. Yes.

Q. Recently? A. It was around the time that I was inquiring at East Texas too.

Q. Could you give me a date on that? Do you know just a month and year? A. It was in—sometime around March or April of '70.

Q. Is that the only time you applied to them for employment? A. For road, yes.

Q. For road? What disposition was made of your application? A. Probably threw it in the trash can. I don't know what he did. The answer is, I don't know.

[3]

[Deposition of Modesto Herrera]

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Modesto Herrera, a witness of lawful age, being first duly sworn in the above cause, testified on his oath as follows:

Direct Examination

Questions by Mr. Penshorn:

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[4] Q. Now, I believe that you went to work for East Texas Motor Freight as a regular employee on May 3, 1965. Is that correct? A. That's correct, sir.

Q. Prior to this did you work for them as a casual driver? A. Yes, sir.

Q. About how long, Mr. Herrera? A. Back to June, '64 on and off.

Q. About the time that you joined the union you started driving as a casual driver for East Texas and other freight lines; is this correct, or just East Texas? A. No. I worked all over as a casual in 1956 when I first joined the union.

Q. You joined the union in '56? A. 1956, yes, sir.

Q. And from 1956 until May, 1965, you were a casual driver? A. No, sir. I worked regular for Southern Pacific from '68 to—I mean '58—excuse me, sir—to '61.

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[8] Q. I see. Mr. Herrera, how many different times have you asked supervisors or foremen at East Texas for a job as a road driver? A. How many?

Q. Yes, sir, how many different times? A. Rephrase that again. How many?

Q. How many different times have you asked supervisors at East Texas for a—— A. Three times.

Q. Three times? A. Yes, sir.

Q. Now, I believe that the first time that you asked anyone at East Texas for such a job was in April, '65, when you talked to Mr. Roy McCracken. Is that right? A. That's correct, sir.

[9] Q. Will you tell me exactly what you said to him as well as you can remember now, when you talked to Mr. McCracken on this occasion? A. I just asked him what was the procedure to get on the—working for East Texas Motor Freight as a line driver.

Q. Did you say anything else to him on that occasion? A. No, sir. That is all I asked him. That is all I wanted to know.

Q. What did he tell you? A. I do not recall his response, sir.

Q. Now, the next time that you talked to a supervisor at East Texas was also in 1965, that same year. Is that correct, sir? A. That's correct.

Q. And this was to Mr. Ed Asbury? A. That's correct.

Q. Do you remember approximately when in 1965 you talked to him, Mr. Herrera? A. No, I don't remember the exact date, no, sir.

Q. Can you tell me whether it was the first part of the year or the latter part of the year? A. Well, it would be after—between May and September or October, something like that of the year.

Q. That is fine. A. More or less.

[10] Q. Fine. A. I don't know exactly.

Q. In other words, you spoke to Mr. McCrackten about a line driver's job before you even became a regular employee, didn't you? A. Yes, sir.

Q. Now, on the first occasion that you talked to Mr. Asbury about it, exactly what did you say to him as well as you remember? A. I asked Mr. Asbury for a road job for East Texas Motor Freight, and he told me that I didn't qualify.

Q. Did he say why? A. No, sir.

Q. Did you ask him why? A. He just said I didn't qualify.

Q. You didn't ask him why? A. I asked him, but that is all he gave me in answer.

Q. You asked him but he didn't answer you? A. No, he didn't answer me. He just said that I didn't qualify.

Q. That is all he would tell you? A. Yes, sir.

Q. Did he say anything else to you in that conversation? A. I don't recollect anything else.

Q. And that is all that you said to him? [11] A. About a road job, yes, sir.

Q. And asked him why he didn't qualify? Did you ask him? A. Yes, I asked him, but he just said I didn't qualify. He wouldn't answer.

Q. He wouldn't answer you, all right. Now, I believe you talked to him again or a second time. A. Second time.

Q. In '65. Can you tell me approximately when that was, the second occasion? A. The exact date I don't remember, sir, but it was in '65 when I talked to Mr. Asbury.

Q. Was it the latter part of '65? A. More or less.

Q. At any rate? A. Right, more or less.

Q. Now, where were you when you spoke to him on this occasion? A. There at the dock at East Texas Motor Freight.

Q. Anyone else present? A. No, sir, just him and myself.

Q. And you approached him, and what did you say to him? A. I asked him again about the procedure to be a line driver for East Texas Motor Freight, and he replied that East Texas Motor Freight had a policy that city men couldn't transfer to the road. That is all he said.

Q. Did you ask him anything about that policy? [12] A. He said that the policy—how did he say that? He said the policy was not to be changed or something like that, in that order.

Q. I didn't understand you. What did he say? A. He said that East Texas policy was there, that—let me recall. He said East Texas policy was there and couldn't be changed.

Q. Do you recall anything else that he said? A. No, sir, that is all.

Q. Did you say anything else to him? A. No.

Q. Moe, we have got plenty of time, so just take your time, and if you can't remember right offhand and want to think about it, why do that. If you don't understand my question, make me reask it. We have plenty of time. A. All right, sir.

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Q. Have you ever inquired about getting a road driver's job at any other freight line? A. Prior to East Texas?

Q. Yes, sir. A. Texas Arizona in 1962 or '63, something like that, when [13] I worked there under Mr. K. C. Smith, Texas Arizona.

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[14] Q. Mr. Herrera, have you ever asked any representative or [15] officer of your local union 657 for help in getting a road driver's job? A. Mr. Ezell and Mr. Ray Shafer.

Q. Which one did you talk to first about a road driver's job? A. Mr. Shafer.

Q. When did you talk to Mr. Shafer? A. The exact date I don't remember, sir.

Q. Can you tell me as best you can remember? A. Because I made four or five inquiries to them.

Q. Can you remember the year that you talked to Mr. Shafer about it? A. In '69, for one instance.

Q. You talked to him on another occasion about it? A. Yes, sir, numerous occasions.

Q. What did you say? A. Regarding me working—getting a road driver's job with East Texas Motor Freight.

[16] Q. So you spoke to him on three different occasions about it; is that correct? A. Yes, sir.

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[17] Q. What did you say to him about a road driver's job on that first occasion that you talked to him? A. That I

would like to get a road driver's job with East Texas Motor Freight.

Q. What did he say to you? A. That I couldn't get a road driver's job because the city and the road had two different contracts. I could not transfer from the city to the road.

Q. Did he say anything else to you about the road driver's job? A. No, sir. That is all.

Q. Now, I want you to think real carefully in answering this question. Did he tell you that you could not get a road driver's job? Are those the exact words he used? A. Yes, because there were two different contracts, and I couldn't transfer from the city to the road.

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[18] Q. Now, the next time you talked to Mr. Shafer was in 1969, according to your recollection. Where did that conversation take place? A. In the meeting, in the regular union meeting at the local.

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[20] MR. PENSHORN: Strike that.

Q. I believe you told us you talked to Mr. Shafer on a third occasion, a third time. Where did this conversation take place, Mr. Herrera? A. The same place, in the hall.

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Q. And exactly what did you say to him as well as you can recall? A. That I wanted to be a road driver for East Texas Motor [21] Freight.

Q. Is that all you said to him? A. Yes, sir.

Q. What did he say to you on that occasion? A. He said that we had two different contracts from the city to the road and I couldn't transfer.

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[25] Q. Do you think that East Texas Motor Freight for whom you work discriminates against Mexican-Americans?

A. Well, let me tell you this: I made an application in August, 19—the 21st, 1970, a written application with East Texas Motor Freight, and they never have replied, give me an opening or nothing. There have been a lot of openings there at East Texas Motor Freight. They have hired a lot of drivers at East Texas Motor Freight since August 21, 1970, and none to my knowledge has been Mexican-Americans.

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[27] Q. Do you think that your local union 657 has discriminated against you in any way because you are a Mexican-American? A. I don't think so.

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[28] Q. My question is have you personally ever heard any East Texas employee complain to a union representative that the company was discriminating against Mexican-Americans? A. I have heard two different persons.

Q. Complain to union representatives? A. Yes, sir.

Q. Who was one of them? Who were they? A. Sadrach Perez and Jesse Rodriguez.

Q. And what did you heard Sadrach Perez say? A. That East Texas didn't have Mexican-American drivers on the road.

Q. Who did he say that to? A. Mr. Shafer.

Q. When? A. That date I don't remember.

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[29] Q. Now, who was the other person working for East Texas that you heard complain to a union representative? A. Jesse Rodriguez.

Q. And to whom was he talking when he complained? A. To Ray Shafer.

Q. What did he say to Ray Shafer? A. That East Texas Motor Freight didn't have Mexican-American line drivers.

Q. Did he say anything else to Mr. Shafer on that occassion? A. No, sir.

Q. And what did Mr. Shafer say in reply to him? A. He didn't know.

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[32] Q. Have you ever asked a union representative to try to get this policy changed? A. Yes, sir. I have asked Mr. Shafer, and he said he couldn't do nothing about that.

Q. When did you ask Mr. Shafer to do this? A. One time that I asked him how come we had two separate agreements when we could have one, and you have seniority for both. He said that couldn't be done.

Q. Where were you when this conversation took place? [33] A. At the union hall.

Q. Where in the union hall? A. In his office.

Q. Anyone else present? A. Just him and myself.

Q. Is that the only occasion that you asked that the policy be changed? A. Yes, sir.

Q. Now, Mr. Herrera, are you complaining in this suit that East Texas keeps Mexican-Americans and Negroes out of line driver's jobs? A. Please repeat that.

(The reporter thereupon read aloud as follows:)

"Q. Now, Mr. Herrera, are you complaining in this suit that East Texas keeps Mexican-Americans and Negroes out of line driver's jobs?" A. Yes, sir.

Q. Why are you making that complaint? A. Because they don't have no Mexican-American line drivers or Blacks.

Q. Any other reasons? A. Because I wanted to be a line driver for East Texas Motor Freight. I have made written application.

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[37] Q. All right. At any of those meetings that you attended did you personally get up and ask that the new contract allow city drivers to transfer to road jobs with their city seniority? A. Did I do that?

Q. Yes. A. There was one member of the freight line got up and mentioned that.

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[38] Q. Now, have you ever heard any other member get up at one of those meetings and ask that that be done? A. Just once.

Q. Who was that person? A. I don't recollect which one.

Q. When was it? A. At that meeting that we had for negotiation of the new contract.

Q. The one you are presently working under? A. Yes, sir.

Q. Was he a freight driver? A. He was a freight driver.

Q. But you don't know who he was? A. I don't recollect which one it was.

Q. Do you know where he worked? A. I believe at Roadway.

Q. You don't know who he was? A. Not offhand.

Q. What did he say? A. He got up and said that he would like to see the new contract come up with one contract for the city and the [39] road combined.

Q. What else did he say? A. That is all he asked.

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Q. Now, did you at any of these contract negotiation meetings that you attended ever personally get up and ask for just one contract for both city and road drivers at East Texas? A. Me personally?

Q. Yes. A. No, sir.

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[40] Q. Now, directing your attention still, Mr. Herrera, to these meetings of the freight drivers at which you discussed the new contract to be negotiated by the union, did you personally ever make any complaint that the contract discriminated against either Mexican-Americans or Negroes? A. There in the negotiations?

Q. Yes, sir. A. No, sir.

Q. Did you ever hear anyone else do that? A. No, sir.

Q. Have you ever made any request for any changes in the new contract when you attended any of these meetings? A. Regarding what, sir?

Q. Anything. A. I have stated that we wanted sick leave, annual leave—and I don't recollect the other item.

Q. At any rate, you have gotten up in different [41] meetings and requested that changes be made. Isn't that right? A. Yes, sir.

Q. And no one has ever attempted to keep you from asking and making whatever suggestions you wanted to make, have they? A. No, sir.

Q. Now, after a contract has been negotiated between the union and the freight lines, is that contract not brought back to the members of local 657 for them to vote on? A. Before they sign the contract, you mean?

Q. Yes. A. For approval, yes, sir.

Q. Of the members? A. Of the members.

Q. There is a special meeting for the members to vote on the contract, isn't there? A. Yes, sir.

Q. And there always has been since you have been a member of this union, hasn't there? A. Yes, sir .

Q. Have you attended some of those special meetings to vote on the new contract? A. Yes, sir.

Q. Have you ever voted against any of the new contract proposals? [42] A. No, sir.

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Q. At any of those meetings at which you voted on a contract, did you ever get up and voice any objections to the contract proposals that were submitted to you? A. No, sir.

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[43] Q. Have you ever written or talked to anyone with the Southern Conference of Teamsters about anything you are complaining of in this lawsuit? A. Did I?

[44] Q. Yes. A. Personally?

Q. Yes. A. No, sir.

Q. Have you personally ever written or talked to anyone with the International Brotherhood of Teamsters about anything that you are complaining of in this lawsuit? A. Read that again.

(The reporter thereupon read aloud as follows:)

"Q. Have you personally ever written or talked to anyone with the International Brotherhood of Teamsters about anything that you are complaining of in this lawsuit?" A. You mean writing to the International in Washington, D.C.?

Q. Yes, sir, about anything that you are complaining of in this suit. A. That I wrote?

Q. Yes. A. I never wrote anything.

Q. You have never talked to anyone with the International about any of your complaints in this suit? A. No, sir.

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[45] QUESTIONS BY MR. WEISS:

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[46] Q. Now, between 1946 and 1956 when you came to San Antonio what did you do? During that ten year period after you got out of the Navy before you came back to San Antonio, what did you do? A. For a living ?

Q. Yes. A. I drove a truck.

Q. For a truck line? A. Different—not only one truck line, but different places.

Q. Who did you work for? A. In Austin—they changed their names by now.

[47] Q. Just give the names as they were when you worked for them. Did you work for one company or more than one company? A. I worked for more than one company.

Q. During that ten-year period? A. Yes, sir.

Q. How many companies did you work for? A. Four or five.

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[49] Q. How did you happen to decide to start driving for truck lines? A. When I joined the union.

Q. Did you join the union for the purpose of getting a job with a truck line? A. Just driving a truck.

Q. And you joined the union in what year? A. '56.

Q. '56? A. Yes, sir.

Q. And who did you go to work for? You worked as a casual? A. Casual, yes, sir. I worked all over.

Q. You worked as a casual for various truck lines here in San Antonio? [50] A. Right, sir.

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Q. Driving trailers? A. Truck and trailers.

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[102] Q. Of course, you have told us in response to Mr. Penshorn's questions that there have never been any road drivers, any East Texas road drivers domiciled here in San Antonio. A. Not with East Texas, no, sir.

Q. So if you got a road job you would have to move away from [103] San Antonio? A. Yes, sir.

Q. Are you willing to do that? A. Yes, sir.

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Q. Now, you knew that Valley Copper did have some road drivers domiciled here? A. Right, sir.

Q. And you thought that perhaps if you could get one of those jobs you wouldn't have to leave San Antonio? A. Right, sir.

Q. But after the merger occurred in February, 1970, the road drivers that had been here were moved away by East Texas somewhere else. A. Yes, sir.

Q. So that it is true that there have never been any road drivers here? [104] A. Right.

Q. Now, at the present time you have got two separate rosters, two separate contracts. A. Yes, sir.

Q. For road drivers and San Antonio city drivers? A. Yes, sir.

Q. As well as city drivers under other contracts in other places. Confining it to San Antonio, you have got two separate rosters, seniority rosters for layoff purposes. That is correct, is it not? A. Right, sir.

Q. And job bidding purposes. As long as that situation exists, if you got a road job and moved to Longview or

Dallas or some other place, Los Angeles or some other place where East Texas had road drivers domiciled, you would go to the bottom of the road drivers' seniority list, would you not? A. As it stands now, yes, sir.

Q. And that, of course, would mean that if there was any layoff of road drivers you would be laid off. A. I would be the first one.

Q. You would be the first one to be laid off? A. Yes, sir.

Q. Are you willing to take that sort of a chance? A. Now, you mean?

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[105] Q. Yes. A. I would have to think about it.

Q. You are not prepared to say that—I mean that is taking a terrible chance for a man with a wife and a number of children, isn't it? A. Yes, sir.

Q. To place your welfare and their welfare in jeopardy by taking the bottom of a seniority list or roster. That is correct, is it not? A. I would have taken it in 1970 when I did ask for a road job at that time.

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[117] QUESTIONS BY MR. PENSHORN:

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[129] Q. This Roadway employee that you heard make a statement at the contract negotiation meeting that preceded the current contract you are working under, did you know him very well? A. Well, I know most of the truck drivers.

Q. I am asking you if you knew this particular employee fairly well? A. He is not a personal friend of mine, if that is what you mean.

Q. But did you know his name at the time that he got up and spoke? Did you know who he was? A. Yes, I know who he is, but I mean I have got to think, you know.

Q. But my question is at the time that you saw him get up in this meeting and heard him speak, did you at that time know what his name was? A. Yes, sir.

Q. You did? [130] A. Yes, sir.

Q. About how long had you know him at that time? A. Maybe six or seven years.

Q. Had he been employed by Roadway during that period of time? A. Yes, sir.

Q. Had you seen him frequently in the last six or seven years that you and he both had worked for Roadway and East Texas? A. I see a lot of truck drivers every day.

Q. I am speaking of this particular man, Mr. Herrera. A. I see a lot of truck drivers. I can't pinpoint him. I can give that answer to Mr. Jim Heidelberg.

Q. You are telling me then that you can now find out his name by simply checking and put it in this deposition; is that what you are saying? A. Yes, sir.

Q. You can find out his name? A. Yes, sir.

Q. Will you do that for us? A. Yes, sir.

Q. Put it in the deposition? A. Yes, sir.

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[Deposition of Harold White]

[5] Q. And what is your present position? A. I'm director of safety for East Texas Motor Freight Lines.

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[26] Q. Have your duties changed any from 1970 to the present as director of safety? A. Basically it's more administrative. I still do a great deal of travelling, but now I still have administrative duties that was actually done by Mr. Huffman prior to me taking this job.

Q. Do you still have the opportunity to get out in the field and go to various terminals? A. Right, I sure do.

Q. Do you still on occasion drive with the drivers? A. Yes, I do.

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[27] Q. Do you have the ultimate authority to either approve or disapprove an application for a road driver position? A. This can be twofold, now. This can be—look,

when you ask this question, this takes into consideration there are more people involved in deciding about an applicant being hired. We discuss these matters with the district safety supervisor and even to the personnel director and if the man's qualifications does not meet at least the outline or the policy as set up, then we do not hire him.

Q. Well, what part, exactly, do you play in the decision, let's say, to not hire an applicant for a road driver position? A. I look at the policies as outlined. In other words, I know what the policies are, I look at it as outlined by the company and if this applicant does not meet these standards—he can have a bad safety record or he can have a number of traffic violations or he can be 20 years of age. These things we look at. Then I would tell the supervisor no, this man would not be—he could not be hired.

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[52] Q. Mr. White, turning to the city driver requirements of East Texas Motor Freight, could you briefly tell me the different requirements that a person or qualifications that a person must possess before he's eligible for hire as a city driver for East Texas? A. I don't have a lot of—I don't have a lot to do with this hiring of the city drivers; primarily, I do not. This is done more at the local level with the terminals and then this is passed on to the personnel manager for his checking out.

Q. And that would be whom? A. Sir?

Q. Who would that be, personnel manager? A. It would be Jesse Barnes. Personnel director would be Jesse Barnes and Mr. Bob Maiers.

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[53] Q. Why don't you basically tell me the differences between what a road driver does as opposed to a city driver? A. A road driver in his work, type of work, he works at various hours of the day and night over different terrain travelling from one city to the other with heavier loads at greater speed than you would here in the city. He has to

have considerable more knowledge of the DOT regulations or he does have more knowledge of the DOT regulations than most of your city people do. Your road drivers have to be trained in the manner of how to cope with all types of problems that occur on the road whereby here in the city if a driver breaks down in the city he automatically calls on his radio to ask the shop to send a mechanic. The road driver does not necessarily do this all the time.

In other words, he must make a determination at the time of a breakdown what the needs would be rather than just send a mechanic or a tractor all the way—this could be 200 miles down the road when he might have some simple thing that could be handled by himself by an explanation over the phone or maybe we have someone locally there that could take care of this.

Your city drivers depend primarily on the [54] supervision directly from the terminal, from the city dispatcher, city driver supervisor; whereby your road drivers do not, they assume a lot more responsibility. When they leave the terminal, depart the terminal, until they reach their destination, they do not have the supervision that the city drivers would have in this respect.

Q. As far as the actual driving——

MR. SEAY. Now, wait a minute. He hasn't about finished the difference between the road drivers and the city drivers. Don't cut him off, let him explain about the way they drive on the road and that sort of thing.

MR. HEIDELBERG: That's what I was going to ask him. Go ahead.

THE WITNESS: Your line drivers or your road drivers, they have to have a knowledge of the equipment that they are driving—such as the horsepower, the proper knowledge of your transmission, your clutch—due to the fact that they are travelling at higher rates of speed and they are pulling heavier loads normally than they are in the city. The traffic

on the highway, just one mishap in a split second, an improper decision can make a disaster for you.

[55] Secondly, travelling in all types of grades you can be travelling anywhere from four to five and eight per cent grades. You only make one mistake in that type of—missing your gears in your transmission. We have some terrain that we travel over that if a road driver is not an excellent driver, does not have perfect coordination, the ability to know the limits of his truck, and basically your city people do not know the limits in all of your city—I mean, in all of your equipment. Your road driver makes one mistake, he can either strip out a clutch or he can get it out of gear, he can be travelling off these grades and with the load pushing behind him down the grades and it doesn't take long to burn up your brakes and you've got them on fire. He can run over a vehicle ahead of him or he can turn one over in a curve or he can be transporting some hazardous materials on board and this could create a major disaster for any city or any community. It could wipe out—federal class A or B explosives, he could wipe out a city like that or a small town. Or he could have poisonous class A gas on board. These are the things, part of the things, that we look at in the road driver as far as his [56] responsibility versus the city man.

The city men are driving here in the city, they know they are going from the terminal over to this warehouse. They've got basically a simple route that they travel over there. They may run in fifth gear or sixth gear to get over there. Their speed is not as great as it is on the road. They are not carrying basically as heavy a load as your road drivers are carrying. They may have on a thousand pounds, they may have on ten thousand pounds, but when you are carrying a maximum capacity of 73,280 pounds, in many instances our equipment travels at full capacity, you have to have a road driver that's adjusted to this, that's trained in this respect for this type of driving.

We look at the monetary value of the equipment. Your road equipment is generally the type of equipment that we use runs, oh, up to $30,000. This does not include the trailers. And he can be carrying as much as a hundred thousand plus in cargo out there and a road driver is basically more familiar with the road—I mean, with the state laws of the various states that he travels in than your city people are.

There are many, many things that you can [57] elaborate on as to the difference between a city driver and a road driver. As I said earlier, we do have the moral obligation to put the very best qualified people on the public highways to make sure that we carry out our responsibilities to the federal and to the state regulatory bodies.

Q. (By Mr. Hiedelberg:) Let me ask you this, Mr. White: Is it not true that city drivers handle the same type of equipment on occasion that the road drivers do? A. Occasionally they do, but let's say this: That your city drivers generally have—we have assigned equipment for city drivers. Then when you put them in the road equipment out there, they do not take care of that piece of equipment like a road driver will.

In other words, I will use as an illustration between if you had an old model car versus a new Cadillac. Certainly you'd take better care of that Cadillac than you would that old car. I mean, that's just a hypothetical expression, but the only time that this road equipment is used is on an emergency basis; in other words, where you do not have anything else for a city driver to drive, but you have promised a customer that you are going to make this pick-up or you are going to make this delivery, and then you use that piece of [58] equipment to run that freight over there to his place of business or to make that pick-up. That's generally the only time that we do permit road equipment to be used. I have seen sometimes when we didn't do that.

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[65] Q. Okay. You are familiar with the fact that the no transfer policy has been modifid recently, are you? A. Yes.

Q. And that modification allows city drivers who are domiciled at terminals that also domicile road drivers to transfer to road driver positions, assuming that there is a vacancy? A. No, no, I do not understand it to be that way. The no transfer policy has been modified, as you have mentioned there, is—this company placed upon the bulletin boards a letter, a bulletin advising the city men that they could bid, of course, for line driving jobs in the Southern Conference. They were given a certain amount of time to do this and after that, well, then it was closed.

[66] In other words, so to speak, right now if a city man came up and said I want a road driving job and he was here at the time that this policy was put into effect, he did not bid on it, he did not indicate that he wanted to transfer to the road, then it's closed. In other words, our policy is still in tact as it had been.

Q. Okay. Which terminals did this modification affect? A. The Dallas, Longview, Memphis, Atlanta, San Angelo. I could be wrong, but I believe Shreveport, Louisiana.

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[69] THE WITNESS: Yes, we would have some.

Q. (By Mr. Heidelberg:) Okay. The question is, during the course of your employment with East Texas Motor Freight have you known of any Mexican-Americans who have worked as line drivers for East Texas Motor Freight? A. We have some Mexican-Americans that are line drivers for us out of the El Paso terminal, out of Los Angeles, and I believe that we have some in Phoenix.

Q. Do you know whether or not the Mexican-Americans that work in El Paso are in the Western Conference of the Teamsters? A. They can operate in the Western or the Eastern Division depending upon the position of the freight. In other words, if you have over—more freight on the [70]

east side and you do not have—you've exhausted your driving board, then the Conference is to permit a western driver to operate in the eastern half or likewise in the west.

MR. SEAY. Excuse me, now. Let me just clear that up for the record. You're talking about driving east or west from El Paso, but I understood it was Southern Conference if you go east. Is that what you mean, in the Southern Conference if you go east? I didn't think there was an Eastern Conference, the reason I brought that up.

MR. RISSETTO: There is, but it doesn't affect East Texas.

Q. (By Mr. Heidelberg:) You meant Southern Conference when you were talking about Eastern Conference? A. Right.

Q. Do you know the names of these Mexican-American line drivers in El Paso? A. To give you their full name, I'm not able at this present time, but we do have one that stands out in my mind more than others and that would be a driver by the name of Menajares that drives out of El Paso.

Q. And you don't remember when he was employed as a line driver for East Texas Motor Freight? A. The exact date, no. He's rather new as far [71] as seniority goes.

MR. HEIDELBERG: Can we stipulate that he was employed on 5-15-71?

MR. RISSETTO: Yes.

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[75] Q. Okay. Let me ask you this: Were you ever made aware of the fact that a few city drivers in San Antonio made applications with the terminal manager in San Antonio in 1970 for road driver, line driver positions? A. As far as me being aware from any part of the operation in San Antonio, I don't. I don't—I haven't been to San Antonio in I don't remember when and the only inkling that I would have of it would be just through hearsay.

Q. And you found that they did request [76] transfers up to this point in time? A. I have heard this, yes. I have heard of this, yes.

Q. And who told you that information? A. It would be through the officers of East Texas Motor Freight. The officers, when I mention the officers, there's a difference between a department head and an officer in the company. I heard that—oh, I just heard it in a conversation, but nothing just exactly what transpired in it. I couldn't give you a definite number.

Q. Well, can you remember? Excuse me, go ahead. Were you finished with your answer? A. Yes. I have been told that, now, that these employees are going on that these people have applied for a road driving job.

Q. Can you remember who with the company told you this? A. I'd hate to say I do and not be able to tell you the truth about it.

Q. Do you remember when this person told you, or persons? A. To give you an exact date on it or a month, I couldn't tell you that either. I remember through some of the conversations or with a part of our people [77] out there that they had applied for a position as a road driver, but to give you an exact date on it, I couldn't.

Q. Well, can you recall whether it was in 1972? A. I've heard this conversation in 1972, yes. I've heard that.

Q. Did you hear any conversations in 1971, pertaining to this matter? A. Not to my memory, I haven't.

MR. HEIDELBERG: I'll pass the witness.

CROSS EXAMINATION

BY MR. PENSHORN:

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Q. At the time that the line drivers became organized and represented by the Teamsters Union, did this occur on a system-wide basis of East Texas or just at the Dallas terminal? A. No, it did not occur on a system-wide basis

[78] due to the fact that the St. Louis, or let's say the Central States—this would include St. Louis and Chicago—was already organized. Then it developed here in Dallas, Texarkana, Little Rock—yeah, Little Rock. In this general area here that we were organized.

It came under the Southern Conference. The best I can remember that situation, I believe Dusty Miller was then associated with the Teamsters. We had a fellow that was head of this local by the name of Stewart, Jimmy Stewart, I believe, was president of the Local 745, but I believe this took into this area here at that time.

Q. So, then, what it consisted of was the line drivers, as far as you can recall, in Dallas, Texarkana, Little Rock and what else did you name? A. I didn't name any other area.

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[79] Q. Do you recall about how many terminals East Texas had in Texas in '51 where line drivers were domiciled? A. Dallas, Texarkana, and I believe that is it.

Q. That was it at that time? A. Right.

Q. And, then, at that time, of course, the contract between the Teamsters Union and East Texas only applied to line drivers working for East Texas? A. Yes, sir.

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[80] Q. All right, sir. Now, Mr. White, you have gone into considerable detail in response to Mr. Heidelberg's questions regarding the qualifications that East Texas Motor Freight has for potential line driver personnel. Did the Teamsters Local Union 657 in San Antonio have anything to do with the setting up and establishment of these qualifications for line drivers? A. Not to my knowledge.

Q. What about the Southern Conference of Teamsters, did they have anything at all to do with the company's establishment of these qualifications for line drivers? A. Not to my knowledge.

[81] Q. All right, sir. Does Teamsters Local 657 in San Antonio have any voice as to who you hire for a line driver of East Texas Motor Freight? A. No.

Q. What about the Southern Conference of Teamsters? A. No.

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Q. But at any rate the union has no voice—— A. No.

Q. ——in the decision as to who you hire as a line driver?

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[82] A. No, sir.

Q. To your knowledge did either Teamsters Local Union 657 or the Southern Conference of Teamsters have any voice in the establishment of the publication of the 1954 no transfer rule? A. No.

Q. Now, since 1965, can you tell me where you have had line drivers domiciled in the State of Texas? A. Since 1965 we've had them, let's see, in the City of Fort Worth, Dallas, Texarkana, Longview, Houston—with a correction on Houston, I'm not for sure when—if we had any drivers in—we—yeah, let's see. There was drivers that was transferred out of Houston, I believe, in about the year '65, out of Houston, Texas.

Now, let me ask this question: Is this to take into consideration the purchase of the Copper State?

Q. Yes, sir. A. All right.

Q. Any place that you have line drivers domiciled since July of 1965. A. All right. We've had them in San Angelo; Pecos, Texas; El Paso; and I believe we had one in San Antonio.

Q. Any place else? [83] A. No, no, I can't think of any other cities that we would have.

Q. All right. How long, approximately, did you have a line driver domiciled in San Antonio? A. I couldn't tell you how long we've had him there due to the fact that I don't know what Copper States or VCS Freight Lines did prior to the purchase by East Texas Motor Freight Lines. After East Texas came to the scene and we took over management of Copper State Freight Lines it was found to be not in the—the economics, as far as that part goes, and

also the operating part of the company did not really fit into the part of East Texas Motor Freight as trying to be a transcontinental carrier. We only had one driver there and we—and we transferred—we had a change of operations that permitted us to take this one driver and move him into, say, San Angelo and we could turn San Antonio out of San Angelo for the simple reason that San Antonio was a back hall type of operation for East Texas, it was not a hit hall type of operation.

And as far as the economics of the situation, this is why this change of operations came about. Copper State at that time had so many different types of changes that was in existence at that time, it was almost impossible for East Texas to operate without [84] violating some part of another contract or some other local union; so, therefore, we had to make these changes.

Q. Well, it's correct, then, is it not, that the one line driver that you had stationed or domiciled in San Antonio was a man and a run that you acquired in the purchase of Valley Copper States? A. That is correct.

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[86] Q. All right, sir. So would it be correct, then, to say that the present time you only have line drivers domiciled in Dallas, Longview, San Angelo, Pecos and El Paso? A. That's correct.

Q. And that's all of them? A. That's right.

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[Deposition of Ed A. Asbury]

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[13] Q. After your tenure in this capacity, what was your next job responsibility at East Texas Motor Freight? A. Terminal manager in San Antonio.

Q. When did you become terminal manager? [14] A. Two years ago this month.

Q. Do you recall the exact date? A. December 8.
Q. 1970? A. Yes.

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[18] Q. You were in the corporate headquarters for a considerable period of time. Do you know which individual with the company right now is responsible for hiring line drivers? A. I really don't.

Q. Who was responsible for that when you were up there? A. There would probably be two or three people involved at the terminal which [illegible] would be domiciled. The terminal manager was involved. They had safety supervisors from the corporate office that would be in there checking these drivers out for qualifications, and then I am sure the personnel department would check their records, their background, so it would be three or four people involved.

Q. Can you mention the names of those persons at the corporate office that would be involved? A. Well, in the personnel department would be Robert Meyer. His department would probably be the one to check out the background of the applicants. The safety supervisor worked under the direction of R. W. Huffman who was director of safety at the time I was there. Then the terminal manager at the local terminal level would be concerned.

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[28] Q. Let me ask you this, Mr. Asbury: If a city driver for East Texas Motor Freight here in San Antonio wanted to become a road driver, what would he have to do? A. He could approach that probably from two or three angles. He could go tell his terminal manager or he could write a letter or he could contact somebody from the general office.

Q. So if he contacted his terminal manager, that would be the procedure that he would follow? A. Very possibly that would be. That would probably be his first contact.

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[30] Q. Let me ask you this: Do you know of any city drivers that have applied or made application for transfer to road driver positions? A. I have heard about those.

Q. Which individuals are those, do you know? [31] A. Modesto Herrera, Jesse Rodriguez and Sadrach Perez who is no longer with us.

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Q. If a line driver—excuse me. If a city driver were to come to you at the present time and file a request, a written request similar to the requests that have been filed by these three individuals, would you transfer them to Dallas? A. Yes.

[32] Q. Why would you do that? A. In the first place, again, it is not my decision to determine whether he could transfer from one terminal to another or not. I have no way of knowing the needs at another terminal.

Q. So it just makes good business sense to communicate this information in these applications to corporate headquarters, is that right? A. Right.

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[34] Q. During your tenure as systems manager with ETMF, did you ever know of any Negro who was a line driver, employed as a line driver by East Texas Motor Freight? A. I don't recall seeing any.

Q. And that applies up to the present? A. Yes.

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[35] Q. Do you know of any Mexican-Americans that have driven over the road for East Texas Motor Freight? A. I don't have—I don't recall seeing any.

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[Deposition of Ezra A. Beierle]

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[15] Q. I assum that you were promoted from your present position to—excuse me—from your position in 1965 to another position? A. Yes.

Q. What was that? A. Assistant terminal manager.

Q. Is that the same position you occupy at the present? A. Yes.

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[39] Q. I see. Besides Modesto Herrera, were there any other individuals that made applications that you know of now? A. That I know of now?

Q. Yes, sir. A. Yes.

Q. And who are those individuals? A. Jesse Rodriguez, Sadrach Perez, Trinidad Gomez, Andrew Hernandez.

Q. When did you find out that Jesse Rodriguez had filed an application to go on the road? [40] A. I don't know what date it was. It was right after this suit was filed that I was advised of it.

Q. That would be sometime around October of 1971? A. I would imagine.

Q. How did you find out about it? Did somebody tell you, or did you read about it, or what? A. I asked Mr. Asbury what—why this was being filed, and he said some of the boys had signed some letters applying for it, and I asked him at that time who they were.

Q. Why did you ask him that? A. I was curious to know who they were, but I was not aware of it until then.

Q. And he told you that all the individuals whose names you mentioned had filled out these applications? A. Yes.

Q. Including Andrew Hernandez? A. Yes.

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IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

(Caption Omitted in Printing)

East Texas Motor Freight Lines, Inc.'s Answers to Plaintiffs' First Set of Interrogatories

(Filed March 27, 1972)

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15. • • • Exhibit 2 of these answers contains a list of local unions that are signatory to collective bargaining agreements with ETMF and have traditionally served as a referral source of job applicants. Additionally Exhibit 2 contains a list of those organizations from whom the company has requested employment referrals. Due to the acquisition of Valley Copperstate System and the unavailability of old records, this question cannot be answered in its entirety. However, the attached shows referral sources which have been used and for which we do have records.

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Total Texas employees:

Blacks	193
Spanish Americans	144
Other	7
Anglo	1213
Total	1557

31.	a Number Spanish Line Drivers—	3
	b. Number Negro Line Drivers—	0
	c. Number Anglo Line Drivers—	180
	d. Number Spanish City Drivers—	102
	e. Number Negro City Drivers—	95

f. Number Anglo City Drivers— 347

Total: Southern Conference 2,188

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48. Between July 2, 1965 and February 1972 company policy precluded inter-classification transfer between Road driver and other classifications. By virtue of the applicable collective bargaining agreements, employees classified as city-drivers, checkers, switchers, hostlers, forklift operators, riggers and dockmen periodically bid the aforementioned jobs on the basis of terminal seniority. In light of this procedure it is impossible, from a practicable standpoint to list each of the myriad of individual transfers within this group of classifications. The above jobs carry identical wage rates with the exception of dockmen, which classification pays a rate that is twelve cents less than the remainder. There are no advancements or promotions between classifications.

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62. (a) Yes, with the exception of 35 drivers who run West out of El Paso Texas

(b) Article 5, Sections 1 through 7; Article 40, Section 3; Article 42, Section 2; and Article 6, Sections 1 and 2.

(c) NEGOTIATING COMMITTEE FOR THE EMPLOYEES:

NATIONAL OVER-THE-ROAD AND CITY CARTAGE POLICY AND NEGOTIATING COMMITTEE

Frank E. Fitzsimmons (*Chairman*)

Murray W. Miller
Joseph Trerobela
William Presser
William McCarthy
Roy L. Williams
M. Ralph Dixon
Robert Flynn
A. J. Hardy
Elvin E. Hughes
Weldon L. Mathis
Verne Milton
Joseph W. Morgan
Walter Shea
B. M. Waggoner
Al Weiss

SOUTHERN CONFERENCE OF TEAMSTERS

Murray W. Miller, Chairman
W. C. Smith
Howard Jones
J. W. Morgan
M. R. Dixon
C. D. Winters
G. Sam Webb
C. H. Augustine
Luther A. Watson
Albert J. Johnson
Odell Smith
W. L. Piland
W. M. Hays

• • • • • • • • • •

(e) Party to National Over-the-Road and Southern Conference Supplemental Agreement.

(f) ETMF was advised that the Southern Conference held the Local's Powers of Attorney for the Supplemental Agreement.

Local 745
General Drivers Warehousemen & Helpers
1007 Jonelle St., Dallas, Texas 75217

Local 941
Truck Drivers, Chauffeurs & Warehousemen & Helpers
6944 Commerce Ave.
El Paso, Texas 79915

Local 568
Truck Drivers & Helpers, Shreveport, La.
920 Grimmett Drive
Shreveport, La. 71107

Local 47
Chauffeurs Teamsters & Helpers
3801 Westridge Avenue
Ft. Worth, Tex. 76116

PLAINTIFF'S EXHIBIT 1

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
SAN ANTONIO DISTRICT OFFICE
115 BROADWAY, ROOM 200
SAN ANTONIO, TEXAS

73-2801

District Director's Findings of Fact

Case YSA 2 030

Charge TAUL 0353

JESSE RODRIGUEZ, *Charging Party*

VS.

EAST TEXAS MOTOR FREIGHT, SAN ANTONIO, TEXAS,
Respondent

Date of alleged violation: August 19, 1970 Continuing.

Date of filing charge: August 20, 1970. June 9, 1971 (Amended).

Date of service charge: March 19, 1971. June 11, 1971 (Amended).

1. The Charging Party alleges in his original and amended charges that Respondent has violated and continues to violate Title VII of the Civil Rights Act of 1964, by discriminatorily excluding Spanish Surnamed American and Negro employees from Road Driver Positions.

2. The Respondent is a common carrier engaged in local and long distance trucking, an actively affecting commerce.

3. The Respondent has nation-wide operations and employs over 25 persons.

4. The Charging Party is a 28 year-old Spanish Surnamed American who was employed as a City Driver by the Respondent on September 21, 1965, in the San Antonio Terminal and is presently working for Respondent as a City Casual (on lay-off status). The Charging Party is a member of the International Brotherhood of Teamsters.

5. The Respondent's San Antonio Terminal employees are covered by this National Master Freight Agreement and the Southern Conference Area Local Freight Forwarding, Pickup and Delivery Supplemental Agreement; the Southern Conference Area encompasses Texas, Arkansas, Louisiana, Oklahoma, Alabama, Florida, Georgia, Mississippi, Tennessee and the city of Asheville, North Carolina.

6. The Charging Party in his affidavit dated March 21, 1971, and in a statement dated June 9, 1971 stated: he had spoken to the Assistant Terminal Manager in February, 1970 requesting that he be considered for a position as a Road Driver and that he had also made this request known to the Terminal Manager (who has since been replaced) and to the Local Union President and Job Steward, none of whom took any "positive action" on his behalf.

7. The Charging Party further stated that on August 21, 1970, after filing a charge of discrimination under Title VII, he was called into the Terminal Manager's Office and presented with a typed letter, specifying his request for a Road Position, which he signed.

8. The Respondent's records reveal a type written letter dated 8-21-70, signed by the Charging Party and addressed to the San Antonio Terminal Manager stating: This is to advise that "I, (Charging Party) employed as a City Pick-Up and Delivery Driver, San Antonio Terminal, am applying for a Road or Line Driver Job on this date. . . . I fully realize that if I am accepted as a Road or Line

Driver, I will lose my city seniority from the date of my employment. . ."

9. The Respondent's San Antonio Terminal records reveal identical letters in the personnel files of three other Spanish Surnamed city drivers whose hire dates as city drivers are 3-5-52, 11-16-59 and 5-3-65.

10. The Respondent's San Antonio Terminal Manager stated to a Commission Representative on March 19, 1971, and July 14, 1971, that:

a) There have been no Road Drivers domiciled in San Antonio.

b) Road Drivers come into San Antonio from San Anglo, Planview, Shreveport.

c) The Respondent has had a policy, for at least 10 years, of no transfers between city and road.

d) To his knowledge, there have never been any Spanish Surnamed American or Negro Road Drivers employed in the Respondent's Southern Conference Area.

e) He had no personal knowledge of the Charging Party's or any other Spanish Surnamed American requesting a transfer to a Road Job.

f) Bid's for Road Jobs are not posted in the San Antonio Terminal.

g) A City Driver is paid $4.85 per hr. while Road Drivers are paid 13.175 cents per mile.

11. The Respondent's Director of Training and Personnel in Dallas General Offices stated on June 23, 1971, that applications for all employees are taken locally and final review and approval on all hires are done centrally in the Respondent's Dallas General Offices.

12. The same official stated on June 4, 1971 that the Dallas General Office personnel file on the Charging Party did not contain a copy of his August 21, 1970 letter applying for a Road Position.

13. The Respondent's Director of Training and Personnel further stated on June 18, 1971, that the Respondent has a no transfer policy on transfers between City and Road Jobs for the following reasons.

a) Due to the existence of separate supplemental union contracts covering City and Road Drivers and the existence of two separate seniority rosters for City (by terminal) and Road Drivers (area modified system), the City Driver, in transfering would lose his accumulated city seniority and would go to the bottom of the modified Road Seniority Roster. Since bids and call outs are based on seniority, the City Driver who transferred would have a difficult time making a living.

b) The Respondent believes a City Driver would have a difficult time adapting to a Road Position because it requires that he be away from home.

14. The same official stated on 7-16-71 that, under company policy, a City Driver would have to resign his City Position and apply for a Road Position as a new employee.

15. The Respondent's Seniority Roster for San Antonio Terminal for 3-17-71 shows the following:

Anglo City Drivers	6
Spanish Surnamed American Drivers	38
Negro Drivers	14
Total City Drivers	58

16. The Respondent's Assistant Director for personnel provided on July 15, 1971, and July 23, 1971, the following racial and ethnic information for the Respondent's two largest Terminals in the Southern Conference:

Dallas:	Anglo City Drivers	107
	Spanish Surnamed American Drivers	11
	Negro Drivers	5
	Total City Drivers	123

Houston:	Anglo City Drivers	47
	Spanish Surnamed American Drivers	39
	Negro Drivers	68
	Total City Drivers	154

17. The Respondent's modified Road Seniority list for 5-18-71 indicates that there are 415 Road Drivers employed by Respondent in the Southern Conference Area, all of these are Anglo. (A Spanish Surnamed American Line Driver was hired 5-15-71 according to Director of Personnel and Training but his name does not appear yet on Printout Roster).

18. The Respondent's Assistant Director for Personnel stated in a letter signed on 8-23-71 that records of departed employees are destroyed after 3 years and that a verbal survey of the Respondent's various Terminals in the Southern Conference Area was "unable to verify where we have had Spanish American individuals employed as Line Drivers."

19. The Vice President of a nation-wide common carrier (similar in operations to the Respondent and under the

same National Master Freight Contract stated in a letter of 8-27-71, that in some cities outside the Southern Conference, there has never been a "no transfer rule" affecting the employees if his company and that City and Road Drivers of his company may transfer back and forth with seniority at the time when bids are posted, generally once a year.

20. I find that, prior to the hiring of a Spanish Surnamed American Road Driver on May 15, 1971, the Respondent had employed Spanish Surnamed American and Negro Persons only as City Drivers in the Southern Conference Area and had never employed Spanish Surnamed Americans or Negroes as Road Drivers in the Southern Conference Area.

21. I find that the Respondent's policy of no-transfer and the resulting loss of accumulated seniority (if a City Driver does resign his position and apply for a Road Job as a new employee) has the effect of perpetuating past discriminatory practices by locking Spanish Surnamed Americans and Negroes into the less desirable City Driver positions to which they were initially relegated by race and national origin.

Date: September 9, 1971.

/s/ GUS GONZALES
Gus Gonzales
District Director
San Antonio Office

PLAINTIFF'S EXHIBIT 5

73-2801

August 21, 1970

To:

W. N. Sager, *Terminal Manager*
ETMF Freight System
139 Gembler Road
San Antonio, Texas

This is to advise that I, Mr. Jesus Rodruiquez, Jr., employed as a City Pick-Up and Delivery Driver, San Antonio Terminal, am applying for a road or line driver, job on this date, with the ETMF Freight System.

I fully realize that if I am accepted as a road of line driver, I will loose my city seniority from the date of my employment, which was September 21, 1965.

I feel like my city driving record will more than speak for itself and that I am fully qualified to fulfill the duties of a road or line driver for the ETMF Freight System.

Yours very truly,

Jesus Rodriquez, Jr.
ETMF Freight System
San Antonio, Texas

PLAINTIFF'S EXHIBIT 6

73-2801

August 21, 1970

To:

W. N. Sager, *Terminal Manager*
ETMF Freight System
139 Gembler Road
San Antonio, Texas

This is to advise that I, Mr. Sadrach G. Perez, employed as a City Pick-Up and Delivery Driver, San Antonio Terminal, am applying for a road or line driver job on this date, with the ETMF Freight System.

I fully realize that if I am accepted as a road or line driver, I will loose my city seniority from the date of my employment, which was November 16, 1959.

I feel like my city driving record will more than speak for itself and that I am fully qualified to fulfill the duties of a road or line driver for the ETMF Freight System.

Yours very truly,

/s/ Sadrach G. Perez
Sadrach G. Perez
ETMF Freight System
San Antonio, Texas

PLAINTIFF'S EXHIBIT 7

73-2801

August 21, 1970

To:

W. N. Sager, *Terminal Manager*
ETMF Freight System
139 Gembler Road
San Antonio, Texas

This is to advise that I, Mr. Modesto Herrera, employed as a City Pick-Up and Delivery Driver, San Antonio Terminal, am applying for a road or line driver on this date, with the ETMF Freight System.

I fully realize that if I am accepted as a road or line driver I will loose my city seniority from the date of my employment, which was May 3, 1965.

I feel like my city driving record will more than speak for itself and that I am fully qualified to fulfill the duties of a road or line driver for the ETMF Freight System.

Yours very truly,

/s/ Modesto Herrera
Modesto Herrera
ETMF Freight System
San Antonio, Texas

PLAINTIFF'S EXHIBIT 8

73-2801

1 September 1970

To:

W. N. Sager, *Terminal Manager*
ETMF Freight System
139 Gembler Road
San Antonio, Texas

This is to advise that I, Mr. Trinidad Gomez, employed as a City Pick-Up and Delivery Driver, San Antonio, Terminal am applying for a road or line driver on this date, with the ETM Freight System.

I fully realize that if I am accepted as a road or line driver I will loose my city seniority from the date of my employment, which was 5 March 1952.

Yours very truly,

/s/ Trinidad Gomez
Trinidad Gomez
ETMF Freight System
San Antonio, Texas

December 1, 1970

Mr. Frank Fitzsimmons, *President*
Teamsters National Office
25 Louisiana Avenue NW
Washington, D.C. 20001

PLAINTIFF'S EXHIBIT 9

Dear Mr. Fitzsimmons:

We, the following dues paying members of Local 657 of the Teamsters Union in San Antonio, Texas, hereby request the national office to send an objective monitor to monitor the Teamster elections in December.

We want to say that we are Teamsters and we are proud of our union and that we wish to remain in the union, but we feel that there are many irregularities that have not been explained to us, so; therefore, we have filed for the offices of:

Vice President ..... Modesto (Moe) Herrera
Secretary-Treasurer .. Artemio (Art) Valdez
Recording Secretary .. Sadrach Perez
Trustee ..... Tom Salinas
Trustee ..... Frank Morales
Trustee ..... Senovio Chavez

We want this monitor to conduct the election according to the constitution of the union and federal laws. We do not want any publicity. We want this fight within our union not to get into the newspapers, because we feel this will hurt the union movement generally. This is what we do not want.

One of the things that we are unhappy with is that all of the long haul drivers who make real good money are Anglo and not Mexican Americans or Blacks. We feel that the leadership of the local is not giving the Mexican Americans in the union a fair break. All of the organizers in the union and all of the staff are Anglo in our local. We feel this should be corrected regardless of whether we win or not. If the leadership is not changed, we feel that more and more Mexican Americans will be leaving the Teamsters' Union or look to other unions for leadership. For example, because of the unresponsive leadership in our union several hundred Teamsters have withdrawn from the union in Crystal City, Texas. We want our local to be responsive to the needs and desires of all of the membership and only by conducting a clean and fair election can we be satisfied that the members want the leadership that

will be elected, and this is why it is urgent that the monitor we request be sent.

Very truly yours,

Sadrach Perez, Candidate for
Recording Secretary and Coordinator
of this group
7906 Niagara, San Antonio, Texas
922-0661

Modesto Herrera
615 Benrus, San Antonio, Texas

Artemio Valdez

Tom Salines
519 Delmar, San Antonio, Texas

Frank Morales
519 Yukon, San Antonio, Texas

Senovio Chavez
526 East Sayers Street,
San Antonio, Texas

PLAINTIFF'S EXHIBIT 10

INTERNATIONAL BROTHERHOOD OF TEAMSTERS
CHAUFFEURS · WAREHOUSEMEN & HELPERS
OF AMERICA
AND PRINCIPLE OFFICE, 2301 TRUMBULL AVENUE
DETROIT, MICHIGAN 43216

December 4, 1970

Mr. Sadrach Perez
7906 Niagara
San Antonio, Texas 78224
Dear Brother Perez:

This will acknowledge receipt of the communication you forwarded to this office signed by yourself and Messrs. Herrera, Valdez, Salinas, Morales and Chavez, dated December 1, 1970, concerning job discrimination to Mexican Americans and Blacks, IBT Local Union No. 657 and its upcoming election of officers.

Please be advised that we have forwarded a copy of your correspondence to Mr. Murray W. Miller, Vice President and Area Director of the Southern Conference of Teamsters in Dallas, Texas, for his attention to the matter.

Fraternally yours,

/s/ FRANK E. FITZSIMMONS
Frank E. Fitzsimmons
General Vice President

PLAINTIFF'S EXHIBIT 15

Southern Conference Area

OVER-THE-ROAD MOTOR FREIGHT
SUPPLEMENTAL AGREEMENT

Covering Drivers Employed By

PRIVATE, COMMON AND
CONTRACT CARRIERS

For the Period of:

April 1, 1970 to June 30, 1973

In the Territory of:

ALABAMA, FLORIDA, GEORGIA, MISSISSIPPI,
TENNESSEE, ARKANSAS, LOUISIANA,
OKLAHOMA AND TEXAS

ARTICLE 40.

SCOPE OF AGREEMENT

Section 1.

The execution of this Supplemental Agrement, herein referred to as "Agreement," on the part of the Employer shall cover all over-the-road operations of the Employer in said described area.

• • • • • • • • • •

Section 3. City or Local Work

Local dock work or city pickup and delivery service is not subject to the terms and conditions of this Agreement, but is subject to a separate Agreement entered into between the Employer and the involved Local Union. Employees subject to this Agreement shall not be permitted to perform dock work or city pickup and delivery service where the performance of such work conflicts with the Local City Pickup and Delivery Agreement between the Employer and a Local Union affiliated with the I.B.T.C.W. & H. of A. and except as specifically permitted herein.

Section 4. Pickup and Delivery Limitations

The operations, other than those of a certificated irregular carrier, shall be dock to dock and there shall be no pickups or deliveries permitted at either end of the run except that one pickup of a solid load at point of origin and one delivery of a solid load at destination shall be allowed, provided that the driver receives the applicable hourly rate of pay for time lost through delivery. Pickup or delivery of a trailer at an interline terminal, if located on general route, shall be allowed.

Section 5.

Neither pickup at origin nor delivery at destination shall be permitted where a driver or drivers, or driver and

helper have driven four hundred (400) miles, or on any run which cannot be completed in ten (10) consecutive hours from point of origin to final destination, including such pickup and delivery.

• • • • • • • • • •

ARTICLE 42.

SENIORITY

Section 1.

Seniority rights for employees shall prevail. Seniority shall be broken only by discharge, voluntary quit, or more than a three (3) year layoff. In the event of a layoff, an employee so laid off shall be given two (2) weeks notice of recall by certified mail to his last known home address. In the event the employee fails to make himself available for at at the end of said two (2) weeks, he shall lose all seniority rights under this Agreement. Employees shall give the Employer one (1) week notice of intent to return to work. A list of employees arranged in the order of their seniority, shall be posted in a conspicuous place at their place of employment.

Any protest to the seniority list must be made in writing, with a copy to the Employer and the Union, within thirty (30) days from the date of posting of the seniority list. In the event no protest is made the seniority list, as posted, shall be considered correct and final.

Controversies regarding seniority shall be settled by the Employer and the Union. Failing a settlement by these parties, the controversy shall be processed under the Grievance Procedure set out in Articles 43 and 44 of this Agreement.

Section 2.

(a) Terminal seniority as measured by length of service at such terminal shall prevail except in those

instances where a majority of the employees of an Employer in the Southern Conference Area agree by vote to the contrary.

(b) Within sixty (60) days after the date of the signing of this Agreement any request of any employees of an Employer for seniority other than terminal seniority shall be made to the Local Union involved, and if such request is made during this period all Local Unions involved shall be notified and a vote shall be taken of all employees involved within one hundred twenty (120) days of the date of the signing of this Agreement and a majority vote shall be final and binding. After these time limits no further change from terminal seniority will be made during the life of this Agreement, except as otherwise provided for in this Agreement.

(c) For employees of certain Employers who have operations in both the former Southeast and Southwest Areas, who now have modified and/or terminal seniority, notwithstanding (a) and (b) above, within one hundred and twenty (120) days after the date of the signing of this Agreement, a vote will be taken of all such employees to determine whether terminal or modified system seniority shall apply to these employees in the Southern Conference Area and a majority vote shall be final and binding.

(d) Where there is presently in effect a type of seniority other than terminal or modified system, within sixty (60) days after the date of the signing of this Agreement any request of any employees of an Employer for terminal or modified system shall be made to the Local Union involved,

and if such request is made during this period all Local Unions involved shall be notified and a vote shall be taken of all employees involved within one hundred twenty (120) days after the date of the signing of this Agreement, and a majority vote shall be final and binding. After these time limitations no further change from present seniority will be made during the life of this Agreement, except as otherwise provided for in this Agreement.

Section 3. Reduction in Force

When it becomes necessary to reduce the working force, the last employee hired shall be laid off first and when the force is again increased, the employees are to be returned to work in the reverse order in which they were laid off.

Section 4. Vacancies and New Runs

(a) Vacancies, new runs and new positions, are subject to seniority and shall be posted for bid, except as hereinafter provided. The employee with the highest seniority who bids shall receive such vacancy, new run, or new position. The posting shall be at a conspicuous place so that all eligible employees will receive notice of the vacancy, run or position open for bid. Bids shall remain open for a period of seven (7) days, and runs shall be awarded within seven (7) days thereafter. Seniority shall not govern assignment of equipment.

(b) The bulletining of regular runs shall include the days and approximate time of departure, destination, the routes, type of run and number of days each week (approximate time of departure will not apply at agreed to relay points).

If there is no load for the bid driver at his approximate departure time, the driver will be called at least two (2) hours prior to his approximate departure time and either cancelled or delayed subject to call. If cancelled, the driver will be placed on the extra board with his seniority. If delayed, he will be guaranteed his bid run during his bid day.

All runs shall be posted for bid at least once each twelve (12) months, including peddle runs. Minimum guarantee runs (those paid on hourly basis) shall not be posted for bid, but will be run off the extra board in accordance with their seniority as provided by this Agreement. The number of regular runs to be posted for bid shall be determined by taking 75% of the number of runs operating between two (2) designated points, for a period of six (6) months.

(c) Extra employees at an away from home terminal shall be dispatched back to their home terminal in the same order as dispatched from home terminal and may be dispatched ahead of regular employees, provided such dispatch does not result in cancellation of regular runs back to the home terminal. An extra employee at a point away from home terminal shall be entitled to the first extra trip to his home terminal.

At Point of First Destination

If no load is available to extra employee's home terminal he may be dispatched to another point after all domiciled employees are dispatched.

At Point of Second Destination

If no load is available to extra employee's home terminal he may not be forced to go to any point away from his

home terminal, but may be dispatched to any point if from such third destination point he will be dispatched to his home terminal in one tour of duty.

Either a regular or extra employee may be dispatched on VIA dispatch without regard to extra employees at VIA terminals. Extra employees may be dispatched VIA his home terminal if that dispatch does not violate the above paragraph and does not cancel a regular employee at that terminal. The Employer and the Local Union may establish dispatch rules, these rules will be in writing and signed by both parties. These dispatch rules must be submitted for approval to the appropriate Grievance Committee within ninety (90) days from the date of the signing of this Agreement. Failure of either party to agree to establish dispatch rules the following shall apply: Extra employees upon arrival at home terminal may pick or choose his next destination and hold for same in his seniority order as long as there are drivers available to perform the work.

In the event the dispatch of an extra employee is changed enroute he shall be paid the applicable rate for the type of run he actually performed, subject to the eight (8) hour guarantee.

In using the terms "broken" or "changed" dispatch enroute it is meant that this is done at a terminal or stop between points of origin and destination. Any dispatch given at point of destination is a second run and shall be paid as such in accordance with the provisions set forth in this Agreement.

Wreck of equipment or incapacity of employee, or if dispatch is not completed because of a strike of a Teamsters' Union, shall not be considered a broken dispatch.

An employee is not eligible for dispatch until his elapsed time in a terminal is equal to the minimum running time

plus a statutory rest period. For example: An employee dispatched at 12:00 noon from his home terminal on a run that requires eight (8) hours running time will not be eligible for dispatch at the foreign terminal until sixteen (16) hours past the 12:00 noon original dispatch, or 4:00 a.m. the following morning.

The bid and/or dispatch day shall be the calendar day, midnight to midnight, unless otherwise mutually agreed to by the Local Union and Employer involved. Should there be a dispute as to the mutual agreement of the bid and/or calendar day between the Employer and the Local Union that dispute shall be subject to the grievance procedure. Such agreement must be in writing and signed by both parties with a copy filed with the proper Grievance Committee as provided for in this Agreement. The Local Union and Employer shall arrive at an agreement on the minimum running time and shall file said agreement with the Grievance Committee.

(d) A regular employee at an away-from-home terminal shall be dispatched out in the same order as was dispatched from home terminal. A regular run may be cancelled at the home terminal in order to get an extra employee back to his home terminal for a weekend or holiday, or at any time with empty equipment. If the dispatch of a regular employee is broken, he will be paid his original dispatch, plus miles driven off route and work performed off route.

A road employee may be required to drop a trailer at an interline terminal at point of destination of his run when the terminal of his own Employer is closed.

• • • • • • • • • •

Article 51.

Mileage and Hourly Rates

Section 1.

(a) The mileage rates per mile shall be as follows:

	4-1-70	7-1-71	7-1-72
Single Axle Units	12.925	13.925	14.675
Tandem Axle Units	13.175	14.175	14.925
Tandex 5-Axle Units	13.300	14.300	15.050
Double Bottom Units, Jeeps, or a combination of vehicles or Units not to exceed two trailers	14.325	15.325	16.075
Two-Man Rate	15.085	16.085	16.835
Single-Man Rate	7.5425	8.0425	8.4175
Double Bottoms Not exceeding two 30' Trailers Two-Man Rate	15.835	16.835	17.585
Single-Man Rate	7.9175	8.4175	8.7925

(b) Drivers dispatched with double bottom (not including two forty-foot trailers) shall receive double bottom rate to final destination, even though a box or boxes are dropped enroute. Drivers starting out with single operation but becoming a double operation enroute shall receive a double operation rate to destination point from pickup of second trailer

(c) The hourly rates of pay for employees shall be as follows:

4-1-70	7-1-70	1-1-71	7-1-71
$4.22	$4.37	$4.77	$5.02
1-1-72	7-1-72	1-1-73	
$5.27	$5.52	$5.72	

(d) The hourly rate of pay for Peddle Run employees shall be as follows:

Southwest

4-1-70	7-1-70	1-1-71	7-1-71
$4.30	$4.45	$4.85	$5.10
1-1-72	7-1-72	1-1-73	
$5.35	$5.60	$5.80	

Southeast

4-1-70	7-1-70	1-1-71	7-1-71
$4.28	$4.43	$4.83	$5.08
1-1-72	7-1-72	1-173	
$5.33	$5.60	$5.80	

• • • • • • • • • •

ARTICLE 54.

TWO-MAN OPERATION

The following rates of pay shall prevail for the two-man operation:

Section 1.

(a) Two-Man Rate per Mile

Double Bottoms Not Exceeding Two 30' Trailers

April 1, 1970	15.085	15.835
July 1, 1971	16.085	16.835
July 1, 1972	16.835	17.585

(b) Single Man Rate

April 1, 1970	7.5425	7.9175
July 1, 1971	8.0425	8.4175
July 1, 1971	8.4175	8.7925

Section 2. Hourly Rates of Pay

4-1-70	7-1-70	1-1-71	7-1-71
$4.22	$4.37	$4.77	$5.02
1-1-72	7-1-72	1-1-73	
$5.27	$5.52	$5.72	

The rate of pay for pickup and delivery or delay time shall be as follows: Pickup and delivery shall be paid for at the full hourly rate for each man. Both drivers on two-man operat[illegible] shall receive the same rate of pay when delayed on pickup and delivery. Full allowance for breakdown, layover, impassable highway and deadheading time and for lodging, etc., as specified elsewhere in this Agreement, shall apply for both men.

There shall be no allowance for time spent taking fuel and oil enroute between terminals.

Flagrant abuse of free time shall constitute a violation of this Section, and shall be subject to the grievance machinery of Article 44.

• • • • • • • • • •

PLAINTIFF'S EXHIBIT 16

NATIONAL MASTER FREIGHT AGREEMENT

Covering

OVER-THE-ROAD

and

LOCAL CARTAGE EMPLOYEES OF PRIVATE COMMON, CONTRACT AND LOCAL CARTAGE CARRIERS

For the Period of

APRIL 1, 1970

Through

JUNE 30, 1973

ARTICLE 5.

Section 1. Seniority Rights

Seniority rights for employees shall prevail under this Agreement and all Agreements supplemental hereto. Seniority shall only be broken by discharge, voluntary quit, more than a three (3) year lay-off, or for such greater period than three (3) years as a change of operations committee may direct during the third year as provided in Article 8(e) herein, or as provided in any applicable provisions of the Supplemental Agreements. The extent to which seniority shall be applied as well as the methods and procedures of such application shall be clearly set forth in each of the Supplemental Agreements.

• • • • • • • • • •

Section 6.

The Union shall be entitled to a seniority list each six months upon request. The Employer shall post a seniority list at least once every twelve (12) months. Employees shall make written complaint to the Company and Union within 30 days after such posting. Any such complaint not settled between the Company and Union shall be submitted to the grievance procedure.

• • • • • • • • • •

ARTICLE 38.

NON-DISCRIMINATION

The Employer and the Union agree not to discriminate against any individual with respect to his hiring, compensation, terms or conditions of employment because of such individual's race, color, religion, sex, or national origin, nor will they limit, segregate or classify employees in any

way to deprive any individual employee of employment opportunities because of his race, color, religion, sex, or national origin.

• • • • • • • • • • •

Southern Conference Area

Local Freight Forwarding

Pickup & Delivery

SUPPLEMENTAL AGREEMENT

Covering Employees of

PRIVATE. COMMON. CONTRACT

and

LOCAL CARTAGE CARRIERS

For the Period of

April 1, 1970 to June 30, 1973

Covering the Operations in the Territory of:

ARKANSAS, LOUISIANA, OKLAHOMA AND TEXAS, ALABAMA, FLORIDA, GEORGIA, MISSISSIPPI, TENNESSEE, and the City of ASHEVILLE, N. C.

ARTICLE 40.

Section 1. Scope of Agreement

(a) The execution of this Agreement on the part of the Employer shall cover all the Local Freight Forwarding Pickup and Delivery operations of the Employer in said described area, excluding El Paso, Texas.

(b) If the Employer begins operating a terminal in a city where there is now no terminal, the Employer agrees that as soon as the Union shows the Employer authorizations signed by the majority of the City Pickup and Delivery and Dockmen employees, this Agreement shall automatically become effective.

Section 2. Employees Covered

Employees covered by this Agrement shall be construed to mean any Driver operating a truck, tractor, motorcycle, passenger or horse-drawn vehicle, or any other vehicle operated for transportation purposes when used to defeat the purpose of this Agrement, and Checkers, Switchmen, Hostlers, Forklift Operators, Riggers and Dockmen.

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ARTICLE 42.

SENIORITY

Section 1.

Seniority rights for employees shall prevail.

Seniority shall be broken only by discharge, voluntary quit, or more than a three (3) year layoff. In the event of a layoff, an employee so laid off shall be given two (2)

weeks notice of recall by certified mail to his last known home address. In the event the employee fails to make himself available for work at the end of said two (2) weeks, he shall lose all seniority rights under this Agreement. Employees shall give the Employer one (1) week notice of intent to return to work.

A list of employees arranged in the order of their seniority shall be posted in a conspicuous place at their place of employment.

Any protest to the seniority list must be made in writing, with a copy to the Employer and the Union, within thirty (30) days from the date of posting of the seniority list. In the event no protest is made the seniority list, as posted, shall be considered correct and final.

Controversies regarding seniority shall be settled by the Employer and the Union. Failing a settlement by these parties, the controversy shall be processed under the Grievance Procedure set out in Articles 44 and 45 of this Agreement.

Section 2.

(a) Terminal seniority, as measured by length of service at such terminal, shall prevail, except as otherwise provided for in this Agreement.

Reduction in Force

(b) When it becomes necessary to reduce the working force, the last employee hired shall be laid off first; and when the force is again increased, the employees are to be returned in the reverse order in which they were laid off.

Section 3.

(a) In all cases where physical fitness or ability to perform the required work are equal, seniority

rights shall govern. The Employer has the right to discipline or transfer any employee or employees in the same classification, to instruct and direct the work, manage the terminals and docks and assign its equipment, and to make rules and regulations for the conduct of its business, not to conflict with the terms of this Agreement.

(b) All new positions or permanent vacancies will be promptly bulletined at the Company terminal for a period of five (5) working days. Qualified employees desiring such positions shall file application in writing with the designated officer of the Employer within five (5) work days. Such assignment will be governed by seniority of applicants, as above outlined. Assignment shall be made within five (5) working days after the closing of bidding. Employees assigned to positions on the effective date of this Agreement or assigned thereafter will not be permitted to transfer to another position until such time that a vacancy or new position exists.

Section 4. Bulletining Of Jobs

The bulletining of positions or vacancies shall consist of the number of days, classifications, the rate of pay, the days to be worked and the starting time, which shall be the same time each day of the assignment except that on two (2) days of the assignment such starting time may be two (2) hours either before the regular starting time or on two (2) days two (2) hours after the regular starting time, but the bulletining of such positions shall specify the starting time on each day of the assignment.

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ARTICLE 55.

WAGES AND HOURS

Section 1.

The guaranteed work week shall be forty (40) hours per week, five (5) consecutive days with a daily guarantee of eight (8) hours per day, time and one-half (1½) after eight (8) hours per day and/or forty (40) hours per week.

Time and one-half (1½) the applicable hourly rate of pay shall be paid for all work performed on the sixth (6th) day, and double time for the seventh (7th) day.

Section 2.

The hourly rates of pay shall be as follows:

Rates of Pay

	4-1-70	7-1-70	1-1-71	
Checker				
SW	$4.30	$4.45	$4.85	
	7-1-71	1-1-72	7-1-72	1-1-73
SW	$5.10	$5.35	$5.60	$5.80
		4-1-70	7-1-70	1-1-71
SE		4.28	4.43	4.83
	7-1-71	1-1-72	7-1-72	1-1-73
SE	5.08	5.33	5.60	5.80
Driver				
		4-1-70	7-1-70	1-1-71
SW		$4.30	$4.45	$4.85
	7-1-71	1-1-72	7-1-72	1-1-73
SW	$5.10	$5.35	$5.60	$5.80
		4-1-70	7-1-70	1-1-71
SE		4.28	4.43	4.83
	7-1-71	1-1-72	7-1-72	1-1-73
SE	5.08	5.33	5.60	5.80

Switchman (Hostler)

		4-1-70	7-1-70	1-1-71
SW		$4.30	$4.45	$4.85
	7-1-71	1-1-72	7-1-72	1-1-73
SW	$5.10	$5.35	$5.60	$5.80
		4-1-70	7-1-70	1-1-71
SE		4.28	4.43	4.83
	7-1-71	1-1-72	7-1-72	1-1-73
SE	5.08	5.33	5.60	5.80

Fork Lift Operator

		4-1-70	7-1-70	1-1-71
SW		$4.30	$4.45	$4.85
	7-1-71	1-1-72	7-1-72	1-1-73
SW	$5.10	$5.35	$5.60	$5.80
		4-1-70	7-1-70	1-1-71
SE		4.28	4.43	4.83
	7-1-71	1-1-72	7-1-72	1-1-73
SE	5.08	5.33	5.60	5.80

Teamster Rigger

		4-1-70	7-1-70	1-1-71
SW		$4.30	$4.45	$4.85
	7-1-71	1-1-72	7-1-72	1-1-73
SW	$5.10	$5.35	$5.60	$5.80
		4-1-70	7-1-70	1-1-71
SE		4.28	4.43	4.83
	7-1-71	1-1-72	7-1-72	1-1-73
SE	5.08	5.33	5.60	5.80

Dockman

		4-1-70	7-1-70	1-1-71
SW		$4.14	$4.29	$4.69
	7-1-71	1-1-72	7-1-72	1-1-73
SW	$4.94	$5.19	$5.48	$5.68
		4-1-70	7-1-70	1-1-71
SE		4.18	4.33	4.73
	7-1-71	1-1-72	7-1-72	1-1-73
SE	4.98	5.23	5.48	5.68

New Classification

Classification of Teamster Rigger shall apply except where work is performed under the AGC agreement on job-site construction. Rigging is in addition to cribbing, blocking, etc. and includes any specialized equipment other than a crane or a similar type of equipment making lift or hoist.

ETMF FREIGHT SYSTEM

PLAINTIFF'S EXHIBIT
73-2801

Compliance Review 35-5-26
Date: 02/29/72
Station: Abilene, Texas
Occupation Code Sequence

STA	NAME	HIRE DATE	EEO	TITLE
19	Mitchell, B. C.	11/14/67	WM7	City Driver
19	Bowles, John T.	06/08/48	WM8	Checker
19	Steele, James R.	09/16/49	WM8	Checker
19	Berry, Artie L.	06/09/48	WM7	City Driver
19	Brown, Aubrey K.	06/08/48	WM7	City Driver
19	Dunn, Orel P.	02/04/50	WM7	City Driver
19	Hatfield, Robert C.	08/08/50	WM7	City Driver
19	Kelley, Jack D.	04/01/51	WM7	City Driver
19	Kelley, William T.	02/03/51	WM7	City Driver
19	Martin, Jack	03/20/51	WM7	City Driver
19	Ingram, Mitchell J.	09/05/59	WM7	City Driver
19	Nelson, A. C.	05/03/58	WM7	City Driver
19	Wade, Lester B.	06/12/60	WM7	City Driver
19	Stevens, Virgil M.	05/11/52	WM1	Terminal Manager
19	Harris, John E.	06/07/48	WM5	Rate Clerk
19	Breaux, Bobbie B.	01/21/51	WF5	Lead Acct Clerk
19	Shofner, Billie R.	09/17/68	WF5	OSD Clerk

STATION TOTAL 17

352

ETMF FREIGHT SYSTEM
Compliance Review 35-5-26
Date: 02/29/72
Station: Amarillo, Texas
Occupation Code Sequence

STA	NAME	HIRE DATE	EEO	TITLE
20	Baggett, Byron M.	03/28/53	WM7	City Driver
20	Conaiser, Arlis D.	11/01/52	WM7	City Driver
20	Sain, Harold W.	11/07/52	WM7	City Driver
20	Thomas, Wallace J.	03/30/54	WM7	City Driver
20	Young, James E.	06/01/53	WM7	City Driver
20	Cook, James A.	04/18/66	WM1	Terminal Manager
20	Walker, Joene	10/07/63	WF5	Rate Clerk

STATION TOTAL 7

353

ETMF FREIGHT SYSTEM
Compliance Review 35-5-26
Date: 02/29/72
Station: Atlanta, Texas
Occupation Code Sequence

STA	NAME	HIRE DATE	EEO	TITLE
21	Kirkland, David J.	09/02/48	WM7	City Driver
21	Turner, Elbert	05/17/62	WM7	City Driver
21	Turner, William	02/23/46	WM1	Terminal Manager

STATION TOTAL 4

ETMF FREIGHT SYSTEM
Compliance Review 35-5-26
Date: 02/29/72
Station: Austin, Texas
Occupation Code Sequence

STA	NAME	HIRE DATE	EEO	TITLE
22	Bowley, Kenneth W.	09/20/71	WM7	City Driver
22	Hays, Winston T.	01/10/72	WM7	City Driver
22	Bukowsky, Dudley G.	01/21/69	WM7	City Driver
22	Bartz, William	08/24/61	WM7	City Driver
22	Berggren, Carroll E.	02/21/52	WM7	City Driver
22	Clendennen, Alvin C.	04/22/46	WM7	City Driver
22	Pittman, Bennie C.	03/08/64	WM7	City Driver
22	Sprouse, Clifford M.	08/28/46	WM7	City Driver
22	Jones, Otho L.	04/17/50	WM1	Terminal Manager
22	Sepulveda, Jose Z.	06/16/67	SM1	Dock Foreman/Supvr
22	Clark, Fay A.	10/22/70	WF5	Lead Acct Clerk
22	Westbrook, James M.	08/05/70	WM5	OSD Clerk

STATION TOTAL 12

ETMF FREIGHT SYSTEM
Compliance Review 35-5-26
Date: 02/29/72
Station: Beaumont, Texas
Occupation Code Sequence

STA	NAME	HIRE DATE	EEO	TITLE
23	Davis, Joe M.	10/01/46	NM8	Checker
23	Wright, Belma P.	08/17/50	WM8	Checker
23	Atkins, Jerry W.	05/09/66	WM7	City Driver
23	Bailey, Charles L.	07/28/67	WM7	City Driver
23	Booker, Jessie	10/21/48	WM7	City Driver
23	Boykin, Earnest	09/17/53	WM7	City Driver
23	Carnahan, W. G.	09/02/55	WM7	City Driver
23	Carroll, Lavil	01/03/51	WM7	City Driver
23	Cook, Elvin H.	11/01/61	WM7	City Driver
23	Doucet, Adam B.	07/15/57	WM7	City Driver
23	Downs, Walter P.	08/19/68	WM7	City Driver
23	Fontenot, Hubert	09/01/65	WM7	City Driver
23	Fontenot, L. J.	08/08/60	WM7	City Driver
23	Gaudet, James H.	03/15/57	WM7	City Driver
23	Guillory, Emanuel J.	11/03/69	NM8	City Driver
23	Gums, Philip	06/05/51	WM7	City Driver

23	Jones, Roy	06/17/48	NM7	City Driver
23	Kelley, Tommy R.	11/04/69	WM8	City Driver
23	Lacomb, Riley H.	06/02/60	WM7	City Driver
23	Lejune, Rodney	09/08/65	WM7	City Driver
23	Martin, R. G.	07/01/57	WM7	City Driver
23	McClanahan, T. F.	10/01/66	WM7	City Driver
23	McDuffie, J. E.	02/16/52	WM7	City Driver
23	McMellon, L. J.	07/07/54	WM7	City Driver
23	Miller, Edgar W.	07/15/67	WM7	City Driver
23	Richard, Lawrence	03/15/57	WM7	City Driver
23	Robinson, John	09/04/51	NM7	City Driver
23	Thibodeaux, O. J.	10/02/51	WM7	City Driver
23	Thibodeaux, J. D.	11/14/68	WM7	City Driver
23	Thibodeaux, W. R.	07/14/51	WM7	City Driver
23	Tupper, Herbert	10/03/66	WM7	City Driver
23	Webb, John M.	09/14/63	WM7	City Driver
23	Webb, Semun O.	05/16/66	WM7	City Driver
23	Webb, Larry N.	11/15/68	WM8	Dockman
23	Sears, Harry F.	10/15/35	WM1	Terminal Manager
23	Ray, Paul E.	09/12/55	WM1	Dock Foreman/Supvr
23	Layfield, Jr., C.	11/05/48	WM4	Salesman
23	Hoffman, Billy C.	09/26/59	WM1	Line Dispatcher

23	Sears, Dorothy	02/07/51	WF5	OSD Clerk
23	Fillingame, Jr., Jessie E.	09/08/70	WM5	General Clerk
23	McCormick, Calvin	06/19/57	WM1	Office Manager
				STATION TOTAL 41

ETMF FREIGHT SYSTEM
Compliance Review 35-5-26
Date: 02/29/72
Station: Brownwood, Texas
Occupation Code Sequence

STA	NAME	HIRE DATE	EEO	TITLE
26	Carroll, Jr., Onie A.	10/14/68	WM7	City Driver
26	Collier, Earnest E.	04/30/57	WM7	City Driver
26	Cumba, Billy N.	08/18/48	WM7	City Driver
26	Harvison, Lee F.	09/19/55	WM7	City Driver
26	Low, Alfred D.	04/11/56	WM7	City Driver
26	Nullum, Loyd L.	06/07/48	WM1	Terminal Manager
26	Barr, Hattie R.	05/23/57	WF5	Lead Acct Clerk
				STATION TOTAL 7

ETMF FREIGHT SYSTEM
Compliance Review 35-5-26
Date: 02/29/72
Station: Corporate Office
OCCUPATION CODE SEQUENCE

STA	NAME	HIRE DATE	EEO	TITLE
99	Atkins, Robert	04/01/70	WM4	Salesman
99	Young, David L.	09/16/68	WM4	Salesman
99	Magill, John J.	06/05/70	WM4	Salesman
99	Bruce, Webster G.	12/10/55	WM1	Shop Superintendent
99	Anderson, James D.	02/15/62	WM1	Department Head
99	Barnes, Jesse N.	07/01/68	WM5	Department Head
99	Beavers, Jimmy	09/10/51	WM1	Department Head
99	Dawson, F. H.	03/10/52	WM1	Department Head
99	Farmer, Raymond K.	09/14/56	WM1	Department Head
99	Furrh, William P.	03/29/71	WM1	Department Head
99	Hitz, George	01/01/51	WM1	Department Head
99	Mathis, Joel H.	12/01/70	WM1	Department Head
99	O'Brien, John F.	01/04/72	WM5	Department Head
99	Odom, Harold	08/31/70	WM1	Department Head
99	Perez, Pedro A.	03/02/70	SM1	Department Head
99	Revill, Jack	05/28/69	WM1	Department Head
99	Schiff, George	01/07/51	WM1	Department Head

99	Shelton, W. G.	12/19/66	WM1	Department Head
99	Simmons, Dewitt	01/19/47	WM1	Department Head
99	Wells, Jack	08/15/55	WM1	Department Head
99	White, Harold P.	06/10/43	WM1	Department Head
99	Williamson, William	01/04/71	NM1	Department Head
99	Hendrickson, Thomas H.	06/12/69	WM5	Department Head
99	Akridge, Frank O.	01/14/64	WM1	Auditor
99	Cates, R. A.	06/01/51	WM1	Auditor
99	Harrell, Joe D.	02/26/68	WM1	Auditor
99	Anderson, Fred S.	12/10/70	WM1	Officer
99	Blakeney, Jr., M.	10/01/48	WM1	Officer
99	Brown, John K.	01/26/70	WM1	Officer
99	Cloer, Everett E.	01/01/65	WM1	Officer
99	Huffman, R. N.	09/26/57	WM1	Officer
99	Johnson, H. L.	09/26/53	WM1	Officer
99	Kidwell, Rollo E.	10/01/62	WM2	Officer
99	Lewis, J. D.	05/14/68	WM1	Officer
99	Maier, Robert H.	05/26/69	WM1	Officer
99	McMurry, N. E.	03/17/52	WM2	Officer
99	Paschall, G. E.	07/24/53	WM1	Officer
99	Peterson, John C.	10/27/69	WM1	Officer
99	Sanders, James I.	12/24/45	WM1	Officer
99	Paschall, James H.	11/18/57	WM1	Operations Manager

99	Allen, Carl D.	05/17/71	WM1	Asst Dept Head
99	Bierman, H. C.	12/26/51	WM1	Asst Dept Head
99	Clark, Jerald W.	04/19/65	WM1	Asst Dept Head
99	Connally, Alma V.	04/23/70	WF4	Asst Dept Head
99	Dillon, Paul D.	10/16/64	WM1	Asst Dept Head
99	Dreyer, Henry E.	01/04/71	WM1	Asst Dept Head
99	Hall, Carl L.	05/17/71	WM1	Asst Dept Head
99	Hammett, James L.	02/25/64	WM5	Asst Dept Head
99	Merrill, Richard A.	05/24/71	WM1	Asst Dept Head
99	Murphy, James M.	04/23/51	WM1	Asst Dept Head
99	Oates, Betty J.	06/30/65	WF5	Asst Dept Head
99	Racanelli, M. D.	05/27/68	WM5	Asst Dept Head
99	Thurman, E. G.	09/07/60	WM1	Asst Dept Head
99	Wallwork, John F.	09/02/58	WM5	Asst Dept Head
99	Jungman, Edgar L.	09/15/45	WM1	Asst Dept Head
99	Campbell, Rodger R.	06/01/48	WM1	Asst Dept Head
99	Lew, Moon J.	10/15/52	OM1	Asst Dept Head
99	Marquette, Roland	05/07/62	WM4	Warehouse Supervisor
99	Loggins, Patsy L.	10/24/66	WF5	Dictaphone Operator
99	McGehee, Rena	12/06/55	WF5	Dictaphone Operator
99	James, Z. R.	11/29/54	WM5	Rate Clerk
99	Johnson, Joyce	09/28/59	WF5	Rate Clerk
99	Smith, Jr., Lemuel M.	08/30/71	WM5	Rate Clerk

99	Crumpler, Jr., G. C.	07/07/58	WM5	Line Dispatcher
99	Higbee, Douglas G.	09/15/71	WM1	Line Dispatcher
99	Renfro, Donald D.	09/07/71	WM1	Line Dispatcher
99	Rosenkranz, C. F.	08/10/66	WM5	Line Dispatcher
99	Smith, Manson D.	06/18/68	WM1	Line Dispatcher
99	Thompson, D. E.	03/01/62	WM5	Line Dispatcher
99	Stapleton, James R.	04/01/68	WM1	Line Dispatcher
99	Austin, Bobbie B.	07/16/62	WF5	Exec Secretary
99	Crabtree, Sybil F.	10/26/59	WF5	Exec Secretary
99	Dawson, Bessie	10/29/51	WF5	Exec Secretary
99	Flagg, Katherine A.	10/26/70	WF5	Exec Secretary
99	Hall, Wanda L.	03/07/60	WF5	Exec Secretary
99	Kalka, Louise	09/29/58	WF5	Exec Secretary
99	Kline, Wilbur R.	06/18/52	WM5	Exec Secretary
99	Massey, Mary	06/21/65	WF5	Exec Secretary
99	McDonald, Billie R.	02/20/56	WF5	Exec Secretary
99	Miller, Shirley H.	08/23/60	WF5	Exec Secretary
99	Palmore, Pansy G.	09/08/69	WF5	Exec Secretary
99	Prater, Betty J.	03/29/71	WF5	Exec Secretary
99	Smith, Mona D.	03/30/70	WF5	Exec Secretary
99	Bearden, Lavonna	09/23/63	WF5	Secretary
99	Braucht, Glena D.	07/12/71	WF5	Secretary
99	Darden, Donna A.	12/06/71	WF5	Secretary

99	Kerr, Lucinda D.	03/01/71	WF5	Secretary
99	Schiff, Norma E.	11/29/71	WF5	Secretary
99	Speir, Rosa	06/15/59	WF5	Secretary
99	Bradford, Sandra J.	02/01/71	WF5	Secretary
99	Haldran, Barbara J.	03/07/68	WF5	Secretary
99	Brady, Barbara L.	09/20/65	WF5	Keypunch Operator
99	Cargile, Wanda F.	09/06/60	WF5	Claim Clerk
99	Christie, Annie	12/29/50	WF5	Claim Clerk
99	Harvey, Loye H.	09/06/51	WF5	Claim Clerk
99	Williams, Roger W.	08/22/68	WM5	Claim Clerk
99	Boone, Joy L.	08/02/71	WF5	Accts Payable Clerk
99	Clements, Nettie L.	11/16/70	WF5	Accts Payable Clerk
99	Greer, Helen B.	11/04/63	WF5	Accts Payable Clerk
99	Gregston, Doris R.	04/12/71	WF5	Accts Payable Clerk
99	May, William C.	08/25/60	WM5	Accts Payable Clerk
99	Potter, Melba S.	04/06/70	WF5	Accts Payable Clerk
99	Gamel, Bonnie	03/04/52	WF5	Lead Acct Clerk
99	Jenkins, Frances J.	06/02/69	WF5	Lead Acct Clerk
99	McIntosh, Glenda	08/01/55	WF5	Lead Acct Clerk
99	Milliken, Joan C.	10/06/62	WF5	Lead Acct Clerk
99	Shaw, Troy	10/03/55	WF5	Lead Acct Clerk
99	Abraham, Thelma	02/14/66	WF5	Payroll Clerk
99	Anderson, Leola	01/16/45	WF5	Payroll Clerk

99	Barber, Irby L.	05/26/52	WM5	Payroll Clerk
99	Harlin, Glendora M.	12/19/60	WF5	Payroll Clerk
99	McDonald, Charles L.	08/29/60	WM5	Payroll Clerk
99	Otto, Ruby	06/22/59	WF5	Payroll Clerk
99	Clark, Terry S.	03/09/70	WM5	PBX Operator
99	Kilgore; Betty J.	03/15/71	WF5	PBX Operator
99	Wienecke, H. V.	06/23/52	WF5	PBX Operator
99	Frioni, Anthony J.	12/23/57	WM5	Pressman
99	Harsh, Jerry W.	01/03/72	WM5	Pressman
99	Sanches, John W.	08/24/70	WM5	Pressman
99	Gaston, Patricia A.	08/23/71	WF5	Stenographer
99	Barnes, Ann	02/04/71	WF5	General Clerk
99	Bingham, Joyce C.	11/01/71	WF5	General Clerk
99	Caldwell, L. M.	03/26/52	WF5	General Clerk
99	Chambers, Nancy	03/21/62	WF5	General Clerk
99	Cummings, Gloria J.	02/01/71	WF5	General Clerk
99	Hack, Leota J.	09/07/71	WF5	General Clerk
99	Hamill, Jessie N.	11/29/71	WF5	General Clerk
99	Hensley, Martha	09/09/68	WF5	General Clerk
99	Isbell, Annie E.	07/23/56	WF5	General Clerk
99	Pool, Carolyne J.	05/05/69	WF5	General Clerk
99	Sims, Lydia E.	10/14/70	WF5	General Clerk
99	McKee, Virginia L.	03/10/71	WF5	General Clerk

99	Tey, Velma W.	02/04/63	WF5	General Clerk
99	Tomerlin, Juanita	04/11/23	WF5	General Clerk
99	Emmons, Margaret	05/20/68	WF5	File Clerk
99	Hooper, Jonna S.	06/14/71	WF5	File Clerk
99	Taylor, Linda F.	04/15/68	WF5	File Clerk
99	Tigert, Linda F.	01/22/68	WF5	File Clerk
99	Tomerlin, Dianna L.	11/16/70	WF5	File Clerk
99	Babb, Barbara V.	03/26/62	WF5	Accounting Clerk
99	Bauer, Maura	07/25/60	WF5	Accounting Clerk
99	Blasley, E. A.	06/07/65	WF5	Accounting Clerk
99	Bocklmehl, Edene	03/26/68	WF5	Accounting Clerk
99	Boland, Bernice	08/12/68	WF5	Accounting Clerk
99	Brooks, Helen I.	07/27/65	WF5	Accounting Clerk
99	Broome, Frances L.	11/30/70	WF5	Accounting Clerk
99	Conine, Norma F.	02/03/56	WF5	Accounting Clerk
99	Cowan, Cherree L.	04/06/70	WF5	Accounting Clerk
99	Dansby, Jewel L.	11/13/63	WF5	Accounting Clerk
99	Doyle, Juanita	01/03/66	WF5	Accounting Clerk
99	Duvall, Alma	08/04/52	WF5	Accounting Clerk
99	Ellore, Sally	05/28/68	WF5	Accounting Clerk
99	Gill, Betty J.	12/02/60	WF5	Accounting Clerk
99	Griffin, Frances	11/14/66	WF5	Accounting Clerk
99	Gruber, Patricia M.	11/16/70	WF5	Accounting Clerk

99	Hall, Marsha K.	10/15/70	WF5	Accounting Clerk
99	Hawkins, Agnes H.	05/26/58	WF5	Accounting Clerk
99	Fanning, Jane	10/24/68	WF5	Accounting Clerk
99	Morris, Peggy J.	02/15/65	WF5	Accounting Clerk
99	Owen, Ruth M.	05/31/65	WF5	Accounting Clerk
99	Perkins, Dorothy	07/07/58	WF5	Accounting Clerk
99	Renfro, Laura	04/23/62	WF5	Accounting Clerk
99	Ryan, Patricia L.	01/06/69	WF5	Accounting Clerk
99	Shackelford, Jean	01/29/68	WF5	Accounting Clerk
99	Shipley, Stella M.	02/23/56	WF5	Accounting Clerk
99	Squier, T. J.	03/10/54	WF5	Accounting Clerk
99	Sutphen, E. N.	09/23/68	WF5	Accounting Clerk
99	Timms, Bonnie C.	12/29/58	WF5	Accounting Clerk
99	Veatch, Barbara J.	09/05/67	WF5	Accounting Clerk
99	Whally, Dimple D.	06/06/52	WF5	Accounting Clerk
99	Wight, Linda K.	10/02/67	WF5	Accounting Clerk
99	Esch, T. A.	12/22/59	WM5	Watchman
99	Morris, Charlie B.	02/04/63	NM9	Janitor
99	Bray, A. B.	03/01/49	WM1	Company Driver
99	Lanier, Mary N.	02/08/71	WF5	Code Clerk
99	Mitchell, Marie F.	02/16/59	WF5	Code Clerk
99	Smith, Pauline H.	11/04/63	WF5	Code Clerk
99	Wesley, Shirley A.	06/07/71	WF5	Code Clerk

99	Littlefield, Shirley	04/01/68	WF5	Code Clerk
99	Leahy, Ronald W.	03/07/70	WM1	Operations Dept
99	Siple, Paul	05/24/71	WM1	Operations Dept
99	Worl, Ralph	10/22/56	WM1	Operations Dept
99	Zwiezen, Emil S.	02/21/69	WM1	Operations Dept
99	Cole, Don H.	01/14/71	WM5	Systems Analyst
99	Cox, Jack G.	04/01/68	WM1	Systems Analyst
99	Edwards, Leo W.	03/17/69	WM5	Programmer
99	Patterson, Robert E.	05/19/69	WM5	Programmer
99	Bronson, Gary D.	11/10/69	WM1	Mgmt Trainee
99	Cook, Thomas D.	09/08/71	WM1	Mgmt Trainee
99	Erickson, Brent L.	04/29/71	WM1	Mgmt Trainee
99	Brinkley, Charles E.	01/19/70	WM1	Regional Sales Mgr
99	Broadway, H. T.	08/29/56	WM1	Regional Sales Mgr
99	Hutcheson, Rolland C.	07/15/70	WM1	Regional Sales Mgr
99	Herritt, Robert T.	09/20/71	WM1	Regional Sales Mgr
				STATION TOTAL 194

ETMF FREIGHT SYSTEM
Compliance Review 35-5-26
Date: 02/29/72
Station: Dallas, Texas
OCCUPATION CODE SEQUENCE

STA	NAME	HIRE DATE	EEO	TITLE
18	Aldridge, J. B.	02/11/55	WM7	Line Driver
18	Alford, Harold D.	09/10/68	WM7	Line Driver
18	Amstutz, Roger L.	08/25/66	WM7	Line Driver
18	Benningfield, Lee R.	02/12/69	WM7	Line Driver
18	Blackmon, Culbert T.	02/21/51	WM7	Line Driver
18	Brackeen, Jr., Joe	05/25/50	WM7	Line Driver
18	Bradshaw, O'Dell	02/19/49	WM7	Line Driver
18	Buckley, Jesse E.	06/23/65	WM7	Line Driver
18	Burgess, Walter E.	08/02/50	WM7	Line Driver
18	Burns, Thomas R.	08/21/50	WM7	Line Driver
18	Burrell, Cecil E.	08/26/49	WM7	Line Driver
18	Castleman, F. R.	10/10/46	WM7	Line Driver
18	Chriss, Henry D.	08/18/53	WM7	Line Driver
18	Clark, J. D.	08/04/48	WM7	Line Driver
18	Crems, E. C.	02/12/48	WM7	Line Driver
18	Dunn, Alvin C.	08/21/47	WM7	Line Driver
18	Edmiston, Alfred W.	07/01/41	WM7	Line Driver

18	Frost, John H.	02/20/46	WM7	Line Driver
18	Gumpert, James P.	02/17/50	WM7	Line Driver
18	Hallman, G. A.	06/10/68	WM7	Line Driver
18	Hext, John D.	08/15/40	WM7	Line Driver
18	Hunter, Lloyd N.	08/06/68	WM7	Line Driver
18	Keith, Leonard L.	09/21/49	WM7	Line Driver
18	Konutek, Amil F.	05/08/46	WM7	Line Driver
18	Kutter, Adam F.	07/21/49	WM7	Line Driver
18	Larance, Velmer J.	04/01/50	WM7	Line Driver
18	Liles, James L.	06/07/48	WM7	Line Driver
18	Lovelace, Thomas	09/22/48	WM7	Line Driver
18	McLaughlin, Carey A.	08/20/71	WM7	Line Driver
18	Mitchell, Myron G.	09/03/71	WM7	Line Driver
18	Morgan, H. H.	12/08/46	WM7	Line Driver
18	Nichols, Jim R.	08/27/48	WM7	Line Driver
18	Oliver, Neubard C.	08/08/50	WM7	Line Driver
18	Oliver, Leon R.	08/14/51	WM7	Line Driver
18	Pruett, Willard E.	09/11/51	WM7	Line Driver
18	Rankin, Glenn F.	07/30/68	WM7	Line Driver
18	Reed, Dwight W.	04/20/46	WM7	Line Driver
18	Renfro, Lester H.	06/21/49	WM7	Line Driver
18	Roberson, Thomas G.	06/01/49	WM7	Line Driver
18	Scrimshire, F. H.	03/08/49	WM7	Line Driver

18	Smith, Otis C.	03/13/51	WM7	Line Driver
18	Smith, William C.	09/26/49	WM7	Line Driver
18	Stevens, John S.	06/20/50	WM7	Line Driver
18	Tadluck, W. L.	08/20/51	WM7	Line Driver
18	Tatsch, Freddy J.	10/23/48	WM7	Line Driver
18	Templin, Joe V.	05/18/67	WM7	Line Driver
18	Thomas, Ottis D.	08/17/66	WM7	Line Driver
18	Thompson, G. L.	06/26/68	WM7	Line Driver
18	Truelove, Robert S.	07/10/50	WM7	Line Driver
18	Turner, ! ! ! ! ! G.	07/06/50	WM7	Line Driver
18	Turner, Walter E.	05/05/49	WM7	Line Driver
18	Ussery, James E.	08/05/47	WM7	Line Driver
18	Vicars, Robert P.	03/15/49	WM7	Line Driver
18	Walker, Odas L.	03/25/55	WM7	Line Driver
18	Wammack, Joseph W.	07/26/50	WM7	Line Driver
18	Wardlow, Jimmie	07/30/68	WM7	Line Driver
18	Washington, Hoyt L.	09/30/52	WM7	Line Driver
18	Weinheimer, Elgin A.	04/17/42	WM7	Line Driver
18	Womack, Charles	08/10/66	WM7	Line Driver
18	Blackburn, James W.	06/30/67	WM8	Fork Lift Operator
18	Lemons, Samuel	06/07/48	NM8	Fork Lift Operator
18	Allen, Ronald D.	03/01/65	WM8	Checker
18	Allman, Robert C.	08/25/66	WM8	Checker

18	Anderson, Jimmy W.	03/06/69	WM8	Checker
18	Anderson, William	09/17/59	WM8	Checker
18	Araiza, Pete L.	07/31/68	SM8	Checker
18	Archibald, L. D.	11/05/68	WM8	Checker
18	Baisden, Jr., J. F.	09/11/68	WM8	Checker
18	Bailey, Robert T.	09/30/68	WM8	Checker
18	Baker, Donald D.	02/12/69	WM8	Checker
18	Barnett, Johnnie	01/31/66	NM8	Checker
18	Bartlett, Raymond L.	10/13/69	WM8	Checker
18	Batey, George N.	09/30/66	WM8	Checker
18	Bean, Dwain A.	09/06/67	WM8	Checker
18	Becerra, Louis C.	10/22/69	SM8	Checker
18	Bedford, Crawford A.	02/10/69	NM8	Checker
18	Bell, Roger E.	09/09/68	NM8	Checker
18	Bennett, Billy R.	09/17/67	WM8	Checker
18	Bennett, George A.	01/08/64	WM8	Checker
18	Bigham, Gary W.	11/18/66	WM8	Checker
18	Blair, Bill E.	09/03/68	WM8	Checker
18	Bradley, Sammy D.	07/19/68	WM8	Checker
18	Bralley, Larry H.	10/31/69	WM8	Checker
18	Brookins, Rodney D.	04/11/66	WM8	Checker
18	Busby, Earl E.	07/23/55	WM8	Checker
18	Canant, R. A.	09/21/66	WM8	Checker

18	Capps, Johnny D.	07/20/65	WM8	Checker
18	Carter, Elzie	02/10/69	NM8	Checker
18	Carter, James O.	09/16/67	WM8	Checker
18	Castle, Dennis W.	07/22/68	WM8	Checker
18	Castro, Galdino	11/22/66	SM8	Checker
18	Cate, Bobby W.	09/30/69	WM8	Checker
18	Chatham, B. D.	09/10/68	WM8	Checker
18	Clark, Winifred P.	07/16/56	WM8	Checker
18	Cleveland, Larry	09/22/67	WM8	Checker
18	Cole, Robert T.	06/14/67	WM8	Checker
18	Coleman, Henry M.	09/28/52	WM8	Checker
18	Coleman, James W.	03/20/52	WM8	Checker
18	Cooper, Randy N.	10/13/69	WM8	Checker
18	Corcoran, H. N.	01/25/64	WM8	Checker
18	Coronado, Johnny	09/09/63	SM8	Checker
18	Coverdale, D. W.	09/06/68	WM8	Checker
18	Cox, Robert L.	06/03/49	NM8	Checker
18	Crabtree, Elton R.	03/23/64	WM8	Checker
18	Crouch, Larry D.	02/12/69	NM8	Checker
18	Cunningham, Marvin E.	08/19/68	WM8	Checker
18	Daniel, Tommy A.	09/21/66	WM8	Checker
18	Davey, Robert S.	05/22/67	WM8	Checker
18	Davis, Billy R.	02/12/69	WM8	Checker

18	Defratus, Thomas D.	11/18/69	WM8	Checker
18	Dickerson, V.	09/04/68	WM8	Checker
18	Dickinson, Russell L.	09/30/69	WM8	Checker
18	Dishong, Jack	02/25/59	WM8	Checker
18	Dixon, Jimmy W.	06/10/67	WM8	Checker
18	Dooley, David W.	11/08/69	WM8	Checker
18	Dutton, Melvin	09/13/68	WM8	Checker
18	Edmonds, Eddie R.	07/11/68	WM8	Checker
18	Evans, Lewis	02/28/47	NM8	Checker
18	Farmer, Virgil C.	07/15/68	WM8	Checker
18	Finch, Isaac	02/21/48	NM8	Checker
18	Fink, Johnny E.	09/07/68	WM8	Checker
18	Flemming, Willie Z.	11/21/69	NM8	Checker
18	Flowers, James A.	01/08/57	WM8	Checker
18	Ford, Richard P.	08/26/68	WM8	Checker
18	Franks, W.	10/23/67	WM8	Checker
18	Fultner, David B.	10/13/69	WM8	Checker
18	Furr, Freddie M.	09/27/66	WM8	Checker
18	Garza, Jesse G.	10/29/69	SM8	Checker
18	Gee, Jr., Carl	05/20/55	WM8	Checker
18	Glaze, Norman C.	09/30/69	WM8	Checker
18	Goerdel, Fred L.	02/10/69	WM7	Checker
18	Goer, Haymond	10/31/69	NM8	Checker

18	Goodwin, James K.	09/12/67	WM8	Checker
18	Goolsby, Clarence R.	03/05/69	WM8	Checker
18	Granstaff, Robert C.	06/23/58	WM8	Checker
18	Grinnell, Emmett S.	03/23/69	WM8	Checker
18	Gunnels, Arthur W.	11/15/68	WM8	Checker
18	Hall, John D.	07/14/68	WM8	Checker
18	Hallmark, Mendal F.	10/29/69	WM8	Checker
18	Hamilton, James M.	09/05/67	WM8	Checker
18	Hamner, Virgil E.	10/31/69	WM8	Checker
18	Haney, William E.	09/30/69	WM8	Checker
18	Hann, Abraham L.	07/02/47	NM8	Checker
18	Harden, Melvin A.	10/11/66	NM8	Checker
18	Harvey, Melvin P.	09/28/59	WM8	Checker
18	Hawley, Kenneth L.	05/15/57	WM8	Checker
18	Hendun, Delbert D.	08/28/68	WM8	Checker
18	Hightower, Alversten	02/21/69	NM8	Checker
18	Hipp, Andrew J.	05/17/56	WM8	Checker
18	Hitt, Tolbert B.	02/16/63	WM8	Checker
18	Hoffman, Douglas	11/19/69	WM8	Checker
18	Hooten, Marvin O.	11/21/66	NM8	Checker
18	Howard, Sr., Cecil E.	09/75/49	WM8	Checker

ETMF FREIGHT SYSTEM
Compliance Review 35-5-26
Date: 02/29/72
Station: El Paso, Texas
Occupation Code Sequence

STA	NAME	HIRE DATE	EEO	TITLE
27	Adair, Dale L.	09/01/71	WM7	Line Driver
27	Bordelon, Alphonse	09/29/69	WM7	Line Driver
27	Burgoyne, Edward W.	10/16/71	WM7	Line Driver
27	Canafax, Robert L.	08/13/71	WM7	Line Driver
27	Dickson, H. S.	05/29/68	WM7	Line Driver
27	Fellabaum, Jr., Edward A.	08/17/71	WM7	Line Driver
27	Harris, Jr., Arlie R.	01/22/72	WM7	Line Driver
27	Hayes, Jr., William T.	08/13/71	WM7	Line Driver
27	Head, Joe H.	05/23/71	WM7	Line Driver
27	Lee, James A.	10/16/71	WM7	Line Driver
27	Hinjares, Ernesto G.	05/15/71	SM7	Line Driver
27	Moore, Walter B.	01/26/72	WM7	Line Driver
27	Nally, Gene V.	01/27/72	WM7	Line Driver
27	O'Briant, Marion P.	07/12/54	WM7	Line Driver
27	Ribble, Cecil L.	07/23/71	WF7	Line Driver

27	Roberts, Clifford M.	05/09/71	WM7	Line Driver
27	Russell, Wayne A.	01/22/72	WM7	Line Driver
27	Storts, Billy R.	10/09/71	WM7	Line Driver
27	Villalogos, Saul R.	08/17/71	SM7	Line Driver
27	Wilson, George M.	01/25/72	WM7	Line Driver
27	Yeater, Mike C.	02/10/72	WM7	Line Driver
27	Craig, Hill E.	10/01/48	WM7	Line Driver
27	Delgado, Joe L.	04/30/61	SM7	Line Driver
27	Jones, Winfred C.	04/01/66	WM7	Line Driver
27	Rhoades, Edward H.	04/01/56	WM7	Line Driver
27	Eaton, James N.	05/01/61	WM7	Line Driver
27	Felix, Hubert F.	04/01/48	WM7	Line Driver
27	Baker, C. E.	04/01/69	WM7	Line Driver
27	Boyer, Robert D.	06/30/66	WM7	Line Driver
27	Black, Thomas D.	05/11/52	WM7	Line Driver
27	Abernathy, J. L.	06/01/40	WM7	Line Driver
27	Roberts, James J.	12/24/46	WM7	Line Driver
27	Roles, Travis E.	09/11/50	WM7	Line Driver
27	Shugart, Richard A.	09/07/51	WM7	Line Driver
27	Griffin, Robert S.	04/16/65	WM7	Line Driver
27	Kevil, Ira	02/16/47	WM7	Line Driver
27	Davis, Jack L.	09/24/65	WM7	Line Driver
27	Gorton, Raymond D.	04/12/66	WM7	Line Driver

27	Green, Darwin C.	05/26/66	WM7	Line Driver
27	Harris, Harold L.	09/22/66	WM7	Line Driver
27	Hoover, Lee R.	10/01/65	IM7	Line Driver
27	Johnson, Emil	07/01/65	WM7	Line Driver
27	Klaus, Jr., E.	08/09/67	WM7	Line Driver
27	Knouf, Monte C.	07/21/66	WM7	Line Driver
27	McQuade, Virgil K.	10/06/65	WM7	Line Driver
27	Robertson, Willard F.	09/09/65	WM7	Line Driver
27	Scobie, Glenn	04/17/63	IM7	Line Driver
27	Smith, Edgar L.	08/22/66	WM7	Line Driver
27	Stevenson, Glenn G.	06/13/67	WM7	Line Driver
27	Vinyard, Roy L.	08/29/53	WM7	Line Driver
27	Holden, Carl E.	01/06/60	WM7	Line Driver
27	Asher, James T.	04/10/62	WM7	Line Driver
27	Knoll, Frederick J.	09/12/62	WM7	Line Driver
27	Burleigh, Edward W.	07/21/52	WM7	Line Driver
27	Tanner, Sr., Walter W.	03/16/56	WM7	Line Driver
27	Adauto, Clemente	10/26/46	SM7	City Driver
27	Banda, Miguel	01/24/57	SM7	City Driver
27	Bradford, George S.	04/01/48	NM7	City Driver
27	Castillo, Salvador R.	01/20/46	SM7	City Driver
27	Cordeno, Juan	07/05/49	SM7	City Driver
27	Esparza, Anastacio	07/05/52	SM7	City Driver

27	Gonzalez, George R.	02/08/40	SM7	City Driver
27	Guzman, Isabel H.	01/30/57	SM7	City Driver
27	Maese, Sabino	05/21/61	SM7	City Driver
27	Martinez, Isidro	10/01/47	SM7	City Driver
27	Medina, Atanacio C.	03/01/56	SM7	City Driver
27	Mendivil, Maximo	07/25/67	SM7	City Driver
27	Molinar, Rodolpho	09/01/46	SM7	City Driver
27	Molinar, Salvador	07/05/48	SM7	City Driver
27	Ramos, Santos G.	08/01/53	SM7	City Driver
27	Saenz, Bernardo	07/01/68	SM7	City Driver
27	Salcido, Ramon	08/04/58	SM7	City Driver
27	Uranga, Jesus	06/20/68	SM7	City Driver
27	Villa, Salvador	07/25/67	SM7	City Driver
27	Villar, George	06/16/58	SM7	City Driver
27	Banda, Pete	03/01/52	SM7	City Driver
27	Ramirez, Jesus R.	04/04/45	SM7	City Driver
27	Villalobos, Miguel	02/15/51	SM7	City Driver
27	Martin, Kenneth V.	08/13/71	WM6	A—Mechanic
27	Ingram, Jim T.	07/29/68	WM1	Terminal Manager
27	Ruth, Billy R.	04/15/71	WM1	Dock Foreman/Supvr
27	Stovall, Marshall T.	09/21/71	WM1	Dock Foreman/Supvr
27	Hullum, David L.	06/29/68	WM1	Dock Foreman/Supvr
27	McDade, John R.	02/04/39	WM4	Salesman

27	De La Vega, Henry F.	06/05/52	SM4	Salesman	
27	Adams, Ira Ray	04/15/71	WM8	Serviceman	
27	Ake, George M.	03/10/52	WM6	Serviceman	
27	Cuellar, Jr., C. J.	07/01/68	SM8	Serviceman	
27	Lacy, David B.	10/18/53	NM8	Serviceman	
27	Wooten, David C.	06/01/51	WM8	Serviceman	
27	Olivas, E.	05/23/67	SF5	Rate Clerk	
27	Armstrong, John O.	08/27/71	WM1	Line Dispatcher	
27	Duncan, Cristina B.	11/06/57	SF5	Lead Acct Clerk	
27	McNeil, Carole T.	05/04/64	WF5	OSD Clerk	
				STATION TOTAL	94

ETMF FREIGHT SYSTEM
Compliance Review 35-5-26
Date: 02/29/72
Station: Ft. Worth, Texas
Occupation Code Sequence

STA	NAME	HIRE DATE	EEO	TITLE
28	Archie, Willie B.	08/08/51	NM8	Checker
28	Capps, E. A.	09/27/45	WM8	Checker
28	Henry, John E.	06/01/43	NM8	Checker
28	Rivers, Fred L.	04/14/59	WM8	Checker
28	Ashcraft, C. E.	08/01/61	WM7	City Driver
28	Bretches, K. E.	06/16/50	WM7	City Driver
28	Coker, Delker C.	09/09/68	WM7	City Driver
28	Cook, Donald	03/14/66	WM7	City Driver
28	Dikes, Truman G.	11/16/53	WM7	City Driver
28	Ellis, Douglas E.	03/14/66	WM7	City Driver
28	Fitzgerald, C. W.	08/31/64	WM7	City Driver
28	Frady, J. W.	03/05/50	WM7	City Driver
28	Gibbs, Lawrence H.	07/01/59	WM7	City Driver
28	Hargrove, Lee	07/09/51	WM7	City Driver
28	Hensley, Sam	07/21/58	WM7	City Driver
28	Henson, John G.	09/22/69	WM7	City Driver

28	Holdridge, R. L.	07/20/59	WM7	City Driver
28	Ingle, S. E.	04/25/66	WM7	City Driver
28	Kimbrow, Kirbie K.	10/20/69	WM7	City Driver
28	Lester, G. D.	10/30/49	WM7	City Driver
28	Like, Thomas J.	06/21/66	WM7	City Driver
28	Love, Dwayne L.	10/23/67	WM7	City Driver
28	Martin, James W.	05/13/68	WM7	City Driver
28	McGee, W. E.	10/09/50	WM7	City Driver
28	McKie, Jackie D.	11/21/68	WM7	City Driver
28	Moore, Bob G.	04/25/66	WM7	City Driver
28	Parnell, J. M.	06/16/50	WM7	City Driver
28	Roberts, H. M.	05/20/50	WM7	City Driver
28	Ruddick, Virgil V.	10/13/69	WM7	City Driver
28	Saunders, Robert D.	09/22/69	WM7	City Driver
28	Smith, Jr., James D.	11/21/68	WM7	City Driver
28	Taylor, Glenn A.	09/22/69	WM7	City Driver
28	Taylor, Virgil	08/01/61	WM7	City Driver
28	Walihall, James	06/17/65	WM7	City Driver
28	Whitaker, D. O.	04/13/59	WM7	City Driver
28	White, Glen D.	06/16/69	WM7	City Driver
28	White, Jr., W. M.	03/29/65	WM7	City Driver
28	Wood, James R.	07/20/59	WM7	City Driver
28	Wooten, Gerald W.	10/17/69	WM7	City Driver

28	Brooks, Michael E.	11/22/68	WM8	Dockman
28	Gaston, Jim	08/05/52	WM1	Terminal Manager
28	Holt, Wynn T.	06/22/71	WM1	Dock Foreman/Supvr
28	Jones, Grover	07/10/54	WM1	Dock Foreman/Supvr
28	Leach, James P.	09/09/59	WM4	Salesman
28	Baird, Theo M.	06/01/49	WM1	Operations Manager
28	May, Anna	07/05/55	WF5	Rate Clerk
28	Lehen, Lloyd S.	10/27/69	WM5	OSD Clerk
28	Conner, Frank D.	03/20/68	WM1	Office Manager
				STATION TOTAL 48

ETMF FREIGHT SYSTEM
Compliance Review 35-5-26
Date: 02/29/72
Station: Henderson, Texas
Occupation Code Sequence

STA	NAME	HIRE DATE	EEO	TITLE
29	Linton, Robert P.	06/14/48	WM7	City Driver
29	Miller, Ira	09/18/44	NM7	City Driver
29	Thompson, C. C.	09/23/46	WM7	City Driver
29	Dickson, Mims	06/15/35	WM1	Terminal Manager
29	Dickson, Ollie L.	12/26/35	WF5	Lead Acct Clerk
				STATION TOTAL 5

ETMF FREIGHT SYSTEM
Compliance Review 35-5-26
Date: 02/29/72
Station: Houston, Texas
OCCUPATION CODE SEQUENCE

STA	NAME	HIRE DATE	EEO	TITLE
30	Anderson, B. H.	04/04/63	WM8	Checker
30	Anderson, Harold	07/09/68	WM7	Checker
30	Beets, Alvie	07/02/62	WM8	Checker
30	Blow, Oscar K.	07/30/50	WM8	Checker
30	Britt, Robert E.	12/05/69	WM8	Checker
30	Brownlee, Fred T.	12/11/69	WM8	Checker
30	Bullock, George E.	09/12/69	WM8	Checker
30	Callier, Stumon	04/08/65	NM8	Checker
30	Chandler, J. D.	09/06/49	NM8	Checker
30	Cicherski, Aloysius	02/06/61	WM8	Checker
30	Clay, Alvin G.	12/13/69	NM8	Checker
30	Cook, Frank M.	10/07/63	WM8	Checker
30	Costilla, Eulalio	07/03/62	SM8	Checker
30	Delarosa, Mike F.	10/09/51	SM8	Checker
30	Fontenette, R.	06/28/66	NM8	Checker
30	Gilmore, Dan E.	09/06/69	WM8	Checker
30	Gloyd, Roosevelt	11/10/69	NM8	Checker

30	Graddy, Marion L.	09/11/69	WM8	Checker
30	Graves, Johnny L.	12/02/69	WM8	Checker
30	Green, Billy R.	04/28/67	WM8	Checker
30	Harris, Willie B.	08/29/63	NM8	Checker
30	Harrison, Charles E.	09/08/69	NM8	Checker
30	Henderson, Roland L.	12/17/69	NM8	Checker
30	Hernandez, R. G.	10/13/67	SM8	Checker
30	Holt, Andrew L.	07/06/67	NM8	Checker
30	Hudson, Charlie	03/13/57	WM8	Checker
30	Hypolite, Troy J.	12/01/69	NM8	Checker
30	Ivy, Norvell	09/05/69	NM8	Checker
30	Jarmon, Roger L.	05/18/48	NM8	Checker
30	Keith, Frank E.	09/03/60	WM8	Checker
30	Lemaire, Douglas H.	12/10/69	WM8	Checker
30	Lewis, Willard E.	10/07/68	WM8	Checker
30	MacLean, Donald G.	09/02/69	WM8	Checker
30	McKinney, K. W.	11/08/65	WM8	Checker
30	Munoz, Gaston	04/01/65	SM8	Checker
30	Neal, Hal B.	06/12/51	NM8	Checker
30	Newman, Charles E.	06/10/63	NM8	Checker
30	Oliphant, Harold S.	12/07/69	WM8	Checker
30	Palmer, William H.	10/08/64	WM8	Checker
30	Parker, B. J.	03/07/47	NM7	Checker

30	Perez, Nabor A.	12/12/69	SM8	Checker
30	Possoit, John K.	09/09/69	WM8	Checker
30	Prejean, John L.	09/10/69	NM8	Checker
30	Price, Clifford E.	12/06/69	NM8	Checker
30	Prophet, Richard	05/30/61	NM8	Checker
30	Rayford, James M.	11/05/51	NM8	Checker
30	Roberson, Dan	01/27/54	WM8	Checker
30	Rodriguez, G.	12/27/50	SM8	Checker
30	Rodriguez, Jr., R.	02/26/50	SM8	Checker
30	Shaw, Duval J.	11/14/69	NM8	Checker
30	Singletary, George C.	09/04/69	NM8	Checker
30	Smith, Edwin	06/01/65	NM8	Checker
30	Smith, Willie E.	07/13/59	NM8	Checker
30	Templer, Garlan	10/04/67	WM8	Checker
30	Turner, Roosevelt	12/03/69	NM8	Checker
30	Turner, Walter E.	07/11/66	NM8	Checker
30	Ward, John E.	05/30/64	NM8	Checker
30	West, Willie	02/06/51	NM8	Checker
30	Wilborn, Gobell	04/10/48	NM8	Checker
30	Wilson, Ira J.	11/11/69	NM8	Checker
30	Wright, James M.	01/18/65	WM8	Checker
30	Youngblood, Ivory	08/06/52	NM8	Checker
30	Youngblood, R.	05/14/51	NM8	Checker

30	Green, J. A.	10/07/68	NM8	City Driver
30	Adams, Arthur R.	10/07/68	NM7	City Driver
30	Alariz, Teofilo	06/06/63	SM7	City Driver
30	Alexander, Walker	10/03/51	NM7	City Driver
30	Alhanza, F. R.	08/10/65	SM7	City Driver
30	Alvey, G. C.	06/11/50	WM8	City Driver
30	Bassham, Carl L.	10/04/68	WM7	City Driver
30	Bean, Mike J.	03/18/69	WM7	City Driver
30	Beabout, Charles E.	12/04/69	WM7	City Driver
30	Bell, Marshall	06/08/59	NM7	City Driver
30	Blacknall, Jr., J.	08/30/66	NM7	City Driver
30	Brett, Joe	03/14/59	WM7	City Driver
30	Brooks, Melvin	03/07/69	NM7	City Driver
30	Broussard, Douglas C.	03/14/69	NM7	City Driver
30	Burciaga, Tony	07/26/51	SM7	City Driver
30	Burnett, Ozy	09/20/61	NM7	City Driver
30	Busby, Junior A.	07/20/56	NM7	City Driver
30	Cartwright, R. E.	08/11/65	NM7	City Driver
30	Caspersen, L. P.	06/04/61	WM7	City Driver
30	Castelan, Manuel A.	11/09/69	SM7	City Driver
30	Chapa, Jr., E. T.	06/29/66	SM7	City Driver
30	Cooper, Archie R.	03/04/69	NM7	City Driver
30	Cordaway, Daniel	07/16/68	SM7	City Driver

30	Covington, Melvin C.	02/07/69	NM7	City Driver
30	Cunningham, Bruce W.	09/25/68	WM7	City Driver
30	Daniel, John L.	09/26/68	WM7	City Driver
30	Dawson, Pharis	06/02/61	NM7	City Driver
30	Delagarza, R. U.	06/28/62	SM7	City Driver
30	Edwards, Jr., James F.	07/12/66	NM7	City Driver
30	Elizondo, Jr., Joe	03/06/69	SM7	City Driver
30	Estrello, Arthur	02/05/57	SM7	City Driver
30	Fife, Luther E.	09/25/67	WM7	City Driver
30	Flores, Ruben C.	07/18/68	SM7	City Driver
30	Fonesca, Jose F.	02/06/69	SM7	City Driver
30	Fowler, Thomas	09/18/61	WM7	City Driver
30	Francis, James A.	09/01/68	NM7	City Driver
30	Franco, Rudolph L.	06/03/61	SM7	City Driver
30	Franklin, Robert	05/01/67	NM7	City Driver
30	Frazier, C.	10/09/68	NM7	City Driver
30	Gallegos, G. T.	10/18/66	SM7	City Driver
30	Garcia, Nick G.	03/20/52	SM7	City Driver
30	Gardner, Charlie	09/08/49	NM7	City Driver
30	Gilliard, W. L.	03/15/54	NM7	City Driver
30	Gonzales, John R.	01/19/67	SM7	City Driver
30	Gross, Donald L.	07/15/68	WM7	City Driver
30	Hall, Emory E.	08/30/57	NM7	City Driver

30	Hammock, Willie F.	07/11/57	WM7	City Driver
30	Harmon, Marvin T.	10/10/55	WM7	City Driver
30	Harper, George H.	03/12/69	WM7	City Driver
30	Harris, Henderson	09/19/61	NM7	City Driver
30	Henley, Hallice T.	03/24/69	WM7	City Driver
30	Herford, Robert L.	11/09/59	WM7	City Driver
30	Hernandez, Sr., Henry	06/06/51	SM7	City Driver
30	Hicks, Boyce	10/12/64	NM7	City Driver
30	Hill, Joe	01/01/49	WM7	City Driver
30	Hillsman, S.	10/26/55	NM7	City Driver
30	Hinojosa, Armando	08/25/65	SM7	City Driver
30	Hodges, Curtis H.	04/25/67	WM7	City Driver
30	Hollins, Clarence T.	03/10/69	NM7	City Driver
30	Hopkins, Luke E.	09/16/52	NM7	City Driver
30	Houghton, Henry C.	08/17/53	WM7	City Driver
30	Huelett, Earl	01/03/52	NM7	City Driver
30	Ingram, James R.	08/26/65	WM7	City Driver
30	Jackson, John L.	09/27/65	NM7	City Driver
30	Jackson, R. A.	08/30/57	NM7	City Driver
30	Jacobs, Homer M.	03/14/59	NM7	City Driver
30	Jimenez, E. M.	10/09/63	SM7	City Driver
30	Jones, Tommie L.	04/28/65	NM7	City Driver
30	Kersh, Harold F.	02/06/57	WM7	City Driver

30	Kibby, Joe W.	07/01/62	WM7	City Driver
30	La Fell, Cornelius W.	02/05/69	NM7	City Driver
30	Leal, Augustine	04/26/67	SM7	City Driver
30	Leblanc, Marshall	07/29/57	NM7	City Driver
30	Lenox, Marvin L.	10/14/48	WM7	City Driver
30	Lesley, William	11/17/52	NM7	City Driver
30	Livingston, N.	05/31/61	NM7	City Driver
30	Lyons, W. L.	02/08/57	WM7	City Driver
30	Halveaux, Leroy J.	02/12/69	NM7	City Driver
30	Martinez, H.	10/04/65	SM7	City Driver
30	Massingill, R. L.	08/13/51	WM7	City Driver
30	Mayo, H. E.	10/13/64	NM7	City Driver
30	McCardell, Charlie W.	08/19/48	NM7	City Driver
30	McDaniel, R. T.	07/14/66	WM8	City Driver
30	McDonald, Gordon	08/27/51	WM7	City Driver
30	McDonald, W.	09/16/46	NM7	City Driver
30	McGee, Samuel B.	03/03/69	NM7	City Driver
30	McIntosh, R. T.	09/01/65	WM7	City Driver
30	McKee, Billy N.	09/11/57	WM7	City Driver
30	Mercer, E. C.	02/26/55	WM7	City Driver
30	Mindiola, R. L.	11/09/65	SM7	City Driver
30	Montoya, John	01/25/54	SM7	City Driver
30	Moreno, Paul	08/02/54	SM7	City Driver

30	Morris, William	02/17/69	NM7	City Driver
30	Moseley, Marvis	10/07/55	NM7	City Driver
30	Naranjo, L. R.	08/30/65	SM7	City Driver
30	Ochoe, Pilar P.	07/19/68	SM7	City Driver
30	Orsack, Freddie L.	10/05/68	WM7	City Driver
30	Ortega, Jr., R.	08/23/65	SM7	City Driver
30	Oten, Ever Lee	09/20/51	NM7	City Driver
30	Penney, Stanley	04/21/67	WM7	City Driver
30	Perez, Albert	04/26/65	SM7	City Driver
30	Perry, Walter C.	04/27/65	NM7	City Driver
30	Petties, Louis V.	06/08/59	NM7	City Driver
30	Pickens, Levie	06/02/65	NM7	City Driver
30	Plummer, Wilfred J.	03/21/69	NM7	City Driver
30	Pond, W. J.	01/08/57	WM7	City Driver
30	Pomonis, John C.	09/14/56	WM7	City Driver
30	Prado, Lawrence	10/20/66	SM7	City Driver
30	Ramirez, Joe	01/24/67	SM7	City Driver
30	Ramirez, P. S.	02/13/63	SM7	City Driver
30	Ray, Roscoe	07/13/66	NM7	City Driver
30	Regaldo, Louis S.	04/27/67	SM7	City Driver
30	Reggin, Frank	09/18/50	NM7	City Driver
30	Richards, Steve	08/06/51	NM7	City Driver
30	Riser, Tommie L.	02/25/54	NM7	City Driver

30	Rodney, W. E.	10/26/66	NM7	City Driver
30	Rogers, H. H.	08/30/65	NM7	City Driver
30	Rosemon, Gene A.	02/04/69	NM7	City Driver
30	Salas, Gilbert	02/05/49	SM7	City Driver
30	Salazar, Lino	09/19/61	SM7	City Driver
30	Sample, William P.	02/18/59	WM7	City Driver
30	Shields, Trenis G.	03/11/69	NM7	City Driver
30	Shows, John W.	08/20/56	WM7	City Driver
30	Smith, Wesley P.	07/21/66	WM7	City Driver
30	Stelly, B. L.	10/02/68	NM7	City Driver
30	Sturdavant, W. J.	10/08/54	WM7	City Driver
30	Swonke, C. J.	08/31/57	WM7	City Driver
30	Tatum, Oliver W.	09/10/51	NM7	City Driver
30	Taylor, Roosevelt	05/26/59	NM7	City Driver
30	Thomas, F. D.	04/21/53	NM7	City Driver
30	Thomas, John H.	04/18/62	NM7	City Driver
30	Thomas, Johnell	10/12/67	NM7	City Driver
30	Thomas, W.	10/12/55	NM7	City Driver
30	Tinch, James D.	04/03/63	WM7	City Driver
30	Tompkins, Donald R.	03/09/69	WM7	City Driver
30	Turner, John L.	10/01/68	WM7	City Driver
30	Valdez, Francisco	04/05/63	SM7	City Driver
30	Vallejo, Robert S.	04/17/62	SM7	City Driver

30	Vargas, Louis	06/25/66	SM7	City Driver
30	Walker, ↑ ↑ ↑ ↑ ↑ L.	11/12/69	NM7	City Driver
30	Wanza, Roosevelt	08/25/58	NM7	City Driver
30	Webb, Raymond H.	07/22/66	WM8	City Driver
30	Wesolick, Charles D.	03/02/69	WM7	City Driver
30	West, Owen D.	06/29/62	WM7	City Driver
30	White, Leroy	05/25/59	NM7	City Driver
30	White, Rochell	09/02/65	NM7	City Driver
30	Wilkerson, Harold	09/03/57	NM7	City Driver
30	Woodard, John	03/06/59	NM7	City Driver
30	Woodard, Dale L.	03/17/69	NM7	City Driver
30	Wright, Reuben	07/14/66	NM7	City Driver
30	Yates, John H.	04/16/56	WM7	City Driver
30	Young, Ellis	09/11/57	NM7	City Driver
30	Zipps, Albert R.	10/20/49	WM7	City Driver
30	Cardona, R. G.	07/13/67	SM8	City Driver
30	Davis, Jr., B. T.	09/23/68	NM8	City Driver
30	Johnson, E. L.	07/05/67	NM7	City Driver
30	McGregor, Jr., S.	10/14/68	NM8	City Driver
30	Broussard, Claude	06/23/52	NM7	Hostler (Spotter)
30	Cox, Lawrence E.	10/25/64	WM7	Hostler (Spotter)
30	O'Farrell, L. H.	09/11/55	WM7	Hostler (Spotter)
30	Gentry, Willie C.	01/08/49	NM8	Dockman

30	McVey, Lloyd F.	11/13/69	NM8	Dockman
30	Washington, Raymond L.	09/03/69	NM8	Dockman
30	Allison, Bert W.	08/27/50	WM6	A—Mechanic
30	Blake, Charlie	06/26/52	NM6	A—Mechanic
30	Coggeshall, Jr., George	09/09/49	WM6	A—Mechanic
30	Cordell, Lewis	11/01/51	WM6	A—Mechanic
30	Hargraves, D. W.	07/30/59	WM6	A—Mechanic
30	Hurt, Malford	05/11/48	WM6	A—Mechanic
30	Malone, Carney E.	07/23/52	WM6	A—Mechanic
30	Narendorf, M. W.	12/09/57	WM6	A—Mechanic
30	Tucker, E. B.	07/07/37	WM6	A—Mechanic
30	Johns, J. C.	01/26/59	WM7	Mechanic Helper
30	Guebara, C.	10/15/51	SM9	Porter
30	Lockett, Granvil	02/08/59	NM9	Porter
30	French, F. A.	09/26/53	WM1	Terminal Manager
30	Bearden, Homer R.	09/26/66	WM1	Dock Foreman/Supvr
30	Culp, Gordon R.	03/20/68	WM1	Dock Foreman/Supvr
30	MacGillis, R. J.	02/21/60	WM1	Dock Foreman/Supvr
30	Phillips, J. L.	12/20/65	WM1	Dock Foreman/Supvr
30	Callaghan, Joseph	09/01/68	WM4	Salesman
30	Owens, Jr., Ralph C.	08/27/70	WM4	Salesman
30	Prestridge, E. N.	08/30/65	WM4	Salesman
30	Rashall, Charles	07/15/68	WM4	Salesman

30	Weed, Evan R.	07/27/67	WM4	Salesman
30	McNatt, T. A.	10/10/55	WM1	Shop Superintendent
30	Putnam, James T.	02/22/57	WM1	Shop Foreman
30	Alexander, Johnnie	09/12/50	NM8	Serviceman
30	Augustine, J. P.	10/24/66	NM7	Serviceman
30	Burrell, Harold	02/13/67	NM7	Serviceman
30	Crigar, G. J.	02/01/51	NM8	Serviceman
30	Perridon, Jerry	03/12/68	NM7	Serviceman
30	Shepard, J. M.	09/04/66	NM7	Serviceman
30	Thompson, A. P.	02/06/61	WM1	Driver Supervisor
30	Garrett, Adolph L.	03/02/53	WM1	Operations Manager
30	Mason, Thomas P.	06/16/62	WM1	Terminal Sprdnt
30	Nichols, Charles	07/17/67	WM5	Collector-Inspector
30	McFarland, C. R.	01/19/59	WM5	Rate Clerk
30	Parsons, Ruth	07/08/43	WF5	Rate Clerk
30	Salinas, Paul	04/02/62	SM5	Rate Clerk
30	Blackstock, W.	09/16/68	WM1	Line Dispatcher
30	Lee, Roland E.	01/25/67	WM1	Line Dispatcher
30	Brown, Charlotte L.	01/07/70	WF5	Secretary
30	Fielder, Beryl	05/04/53	WF5	Secretary
30	Essery, Dannie G.	01/22/62	WM5	Lead Acct Clerk
30	Janda, Andrew J.	04/07/69	WM5	OSD Clerk
30	Mullen, Willis L.	04/01/68	WM5	OSD Clerk

30	Pesl, Joseph J.	10/02/67	SM5	OSD Clerk	
30	Smith, James E.	01/03/66	WM5	OSD Clerk	
30	Clark, Rose M.	01/31/69	WF5	Bill Clerk	
30	Heard, Ross S.	04/05/67	WM5	Bill Clerk	
30	Williamson, Joy L.	03/18/69	WF5	Bill Clerk	
30	Davidson, Selma D.	06/30/52	WF5	Accounting Clerk	
30	Gammon, Geneva H.	09/04/68	WF5	Accounting Clerk	
30	Harvey, William D.	11/17/58	WM5	Accounting Clerk	
30	Poorhan, R. C.	03/29/65	WM5	Accounting Clerk	
30	Rippy, Janet B.	05/31/67	WF5	Accounting Clerk	
30	Smith, Dennis D.	02/10/69	WM5	Accounting Clerk	
30	Winters, Dennis O.	02/19/68	WM5	Accounting Clerk	
30	Williams, Richard L.	06/06/71	NM9	Janitor	
30	Carte, Wanda M.	11/17/69	WF5	Tracing Clerk	
30	Keffer, Jack J.	04/13/59	WM5	Office Manager	
30	Rushing, John D.	10/08/68	WM1	Office Manager	
30	Garriet, Joseph	05/13/68	NM7	Mechanic	
				STATION TOTAL	287

ETMF FREIGHT SYSTEM
Compliance Review 35-5-26
Date: 02/29/72
Station: Longview, Texas
OCCUPATION CODE SEQUENCE

STA	NAME	HIRE DATE	EEO	TITLE
31	Adams, Jack F.	09/13/50	WM7	Line Driver
31	Baskin, Richard W.	06/27/69	WM7	Line Driver
31	Calhoun, Hoey	04/06/50	WM7	Line Driver
31	Chapman, Bobby	10/20/59	WM7	Line Driver
31	Chatham, J. H.	09/21/53	WM7	Line Driver
31	Colburn, B. R.	08/05/64	WM7	Line Driver
31	Craig, Samuel E.	12/20/48	WM7	Line Driver
31	Craig, Joe B.	05/08/54	WM7	Line Driver
31	Dickey, Leslie H.	05/20/57	WM7	Line Driver
31	Dugger, Mabry	02/25/51	WM7	Line Driver
31	Fitzgerald, James E.	02/12/69	WM7	Line Driver
31	Gentry, James O.	08/04/69	WM7	Line Driver
31	Gentry, Linas N.	10/17/49	WM7	Line Driver
31	Harris, Dewey D.	10/13/60	WM7	Line Driver
31	Haywood, Thomas	04/16/68	WM7	Line Driver
31	House, Billy	09/14/60	WM7	Line Driver
31	Johnson, James H.	12/13/46	WM7	Line Driver

31	Jones, William O.	05/13/63	WM7	Line Driver
31	Kelley, Louis E.	06/10/63	WM7	Line Driver
31	Knowles, Lee	07/05/61	WM7	Line Driver
31	Luman, Monroe A.	05/04/65	WM7	Line Driver
31	Luman, Robert H.	06/12/65	WM7	Line Driver
31	Parks, Walter A.	02/20/56	WM7	Line Driver
31	Potter, Roy A.	11/24/49	WM7	Line Driver
31	Reeves, Victor E.	06/24/63	WM7	Line Driver
31	Rogers, Emory L.	06/19/63	WM7	Line Driver
31	Rosewell, Vernon	09/04/63	WM7	Line Driver
31	Smith, J. P.	03/03/50	WM7	Line Driver
31	Taylor, Donald L.	08/12/65	WM7	Line Driver
31	Wilson, C. R.	03/10/52	WM7	Line Driver
31	Wlison, W. W.	03/18/54	WM7	Line Driver
31	Yarbrough, John	09/30/59	WM7	Line Driver
31	Broadwater, D. P.	03/21/66	WM8	Checker
31	Butler, Leonard E.	08/13/57	WM8	Checker
31	Coplin, Lloyd J.	05/16/60	WM8	Checker
31	Lambert, Roland B.	10/01/63	WM8	Checker
31	McLarty, Otis H.	08/06/51	WM8	Checker
31	Pope, Dor E.	07/24/67	WM8	Checker
31	Thornton, Larry C.	09/11/61	WM8	Checker
31	Weaver, Gene H.	09/16/59	WM8	Checker

31	Wofford, Reagan	06/04/61	WM8	Checker
31	Baker, William L.	01/02/64	WM7	City Driver
31	Blackstone, Willy	07/17/66	WM7	City Driver
31	Braswell, L. R.	09/07/65	WM7	City Driver
31	Cagle, Royal T.	04/11/52	WM7	City Driver
31	Calicutt, Robert E.	06/10/68	WM8	City Driver
31	Cox, Lowell D.	03/27/66	WM7	City Driver
31	Crews, Ira O.	05/06/48	WM7	City Driver
31	Dotie, Clyde	01/10/47	WM7	City Driver
31	Faggett, Jessie	09/08/46	NM7	City Driver
31	Ferguson, C. E.	08/07/66	WM7	City Driver
31	Ferguson, J. C.	10/25/65	WM7	City Driver
31	Grant, William K.	12/18/50	WM7	City Driver
31	Harty, Billy W.	05/16/66	WM7	City Driver
31	Lewis, Rollie D.	03/06/68	WM7	City Driver
31	McGraw, Alva L.	06/08/66	WM7	City Driver
31	Nugent, Chester	04/10/49	WM7	City Driver
31	Nugent, Forrest L.	05/15/55	WM7	City Driver
31	Parker, James G.	01/31/68	WM8	City Driver
31	Pool, Moody	04/28/52	WM7	City Driver
31	Reeves, Jr., O. F.	08/12/56	WM7	City Driver
31	Reid, Roddy R.	06/07/65	WM7	City Driver
31	Ross, Eston R.	04/07/66	WM7	City Driver

31	Silvertooth, J. W.	04/04/66	WM7	City Driver	
31	Stringer, D. M.	08/02/66	WM7	City Driver	
31	Thompson, C. W.	03/02/68	WM7	City Driver	
31	Thompson, R. H.	07/17/65	WM7	City Driver	
31	Walle., Rayford	03/15/53	WM7	City Driver	
31	Watson, Dee G.	06/03/63	WM7	City Driver	
31	King, Richard B.	02/18/69	WM7	Hostler (Spotter)	
31	Medlock, Billy S.	01/30/69	NM7	Hostler (Spotter)	
31	Hoffman, Lewis R.	10/01/56	WM1	Terminal Manager	
31	Rowland, Edwin L.	09/29/59	WM1	Dock Foreman/Supvr	
31	Spicer, Raymon L.	02/17/52	WM1	Dock Foreman/Supvr	
31	Thomas, Bobby G.	09/04/56	WM1	Dock Foreman/Supvr	
31	White, Donald H.	11/02/70	WM8	Dock Foreman/Supvr	
31	Belcher, Jube H.	07/08/68	WM4	Salesman	
31	Edney, Charles L.	07/10/62	WM5	Asst Terminal Mgr	
31	Ray, Harmon B.	02/16/48	WM1	Terminal Sprdnt	
31	Hall, William T.	12/26/45	WM5	Rate Clerk	
31	Roberts, Fred B.	09/11/55	WM1	Line Dispatcher	
31	Smith, Garry D.	04/04/66	WM1	Line Dispatcher	
31	Washburn, Jerreld	10/27/59	WM5	Line Dispatcher	
31	Ray, Bonnie	01/14/52	-WF5	Lead Acct Clerk	
31	Hestand, David M.	03/21/67	WM5	OSD Clerk	
31	Carter, Billy C.	09/19/68	WM5	Bill Clerk	

31	Gray, Robert	02/13/66	NM9	Janitor	
31	Johnston, Bobby J.	11/21/51	NM9	Janitor	
31	Spencer, Billy J.	10/21/63	WM5	Tracing Clerk	
				STATION TOTAL	90

ETMF FREIGHT SYSTEM
Compliance Review 35-5-26
Date: 02/29/72
Station: Lubbock, Texas
OCCUPATION CODE SEQUENCE

STA	NAME	HIRE DATE	EEO	TITLE	
32	Adams, Junior E.	10/13/58	WM7	City Driver	
32	Bohner, Riley E.	02/14/57	WM7	City Driver	
32	Copeland, Melvin L.	12/09/52	WM7	City Driver	
32	Holloway, Jerry R.	03/19/56	WM7	City Driver	
32	Mantooth, Louis M.	07/01/57	WM7	City Driver	
32	McMillan, Elwyn L.	09/31/57	WM7	City Driver	
32	Quinn, Travis D.	07/22/57	WM7	City Driver	
32	Bradley, Ronnie G.	11/11/69	WM7	City Driver	
32	Morris, William T.	10/18/71	WM1	Terminal Manager	
32	Blackwell, Grant C.	09/24/51	WM5	Rate Clerk	
32	Whitley, Louise D.	05/23/61	WF5	Lead Acct Clerk	
32	Hallenbeck, Sonya L.	08/13/59	WF5	Accounting Clerk	
				STATION TOTAL	12

ETMF FREIGHT SYSTEM
Compliance Review 35-5-26
Date: 02/29/72
Station: Lufkin, Texas
Occupation Code Sequence

STA	NAME	HIRE DATE	EEO	TITLE
33	Allen, Bobby G.	01/13/69	WM7	City Driver
33	Baker, Jesse P.	03/22/65	WM7	City Driver
33	Crager, Jr., W. F.	10/07/68	WM7	City Driver
33	Dickerson, J. W.	02/27/51	WM7	City Driver
33	Hines, Kenneth D.	07/21/69	WM7	City Driver
33	Mosby, Harry L.	07/12/62	WM7	City Driver
33	Oliver, Norman G.	03/03/69	WM7	City Driver
33	Ratliff, Billy E.	09/18/67	WM7	City Driver
33	Rushing, O. E.	03/01/66	WM7	City Driver
33	Stanley, Jr., Leon	08/24/51	WM7	City Driver
33	Thomas, James W.	10/31/66	WM7	City Driver
33	Hill, Jerry W.	10/03/66	WM1	Terminal Manager
33	Powers, Max D.	11/23/59	WM1	Dock Foreman/Supvr
33	Williams, Bertha M.	10/01/71	WF5	General Clerk

STATION TOTAL 14

400

ETMF FREIGHT SYSTEM
Compliance Review 35-5-26
Date: 02/29/72
Station: Marshall, Texas
Occupation Code Sequence

STA	NAME	HIRE DATE	EEO	TITLE
34	Copeland, J. C.	02/16/53	WM8	Checker
34	Cundiff, Sam R.	08/08/66	WM7	City Driver
34	Leath, Virgil	06/18/50	WM7	City Driver
34	Montgomery, A. H.	11/28/61	WM7	City Driver
34	Smith, Irving G.	02/24/69	WM7	City Driver
34	Strong, Earnest R.	06/13/50	WM7	City Driver
34	Strong, Joseph O.	06/08/50	WM7	City Driver
34	Weaver, Joe C.	04/04/66	WM7	City Driver
34	Burroughs, J. A.	02/24/66	WM5	Terminal Manager
34	Bogue, Wiley M.	11/02/59	WM1	Dock Foreman/Supvr
34	Henigan, Charles E.	11/01/71	WM5	Lead Acct Clerk

STATION TOTAL 11

401

ETMF FREIGHT SYSTEM
Compliance Review 35-5-26
Date: 02/29/72
Station: Oulssa, Texas
Occupation Code Sequence

STA	NAME	HIRE DATE	EEO	TITLE
35	Morris, Julies A.	07/31/67	WM7	City Driver
35	Ballard, James R.	03/09/63	WM7	City Driver
35	Butler, Howell W.	10/01/49	WM7	City Driver
35	Settles, B. L.	03/09/52	WM7	City Driver
35	Adkins, James	02/10/55	WM7	City Driver
35	Barnett, Norman W.	10/18/47	WM7	City Driver
35	Fierro, Jr., Toribid	10/10/51	SM7	City Driver
35	Folmar, Howard M.	09/03/51	WM7	City Driver
35	Hewitt, Donald H.	01/21/57	WM7	City Driver
35	Jarrell, Alford A.	04/24/48	WM7	City Driver
35	King, William R.	02/15/56	WM7	City Driver
35	Schmid, Raymond	11/20/56	WM7	City Driver
35	Swanson, Bobby R.	06/09/59	WM7	City Driver
35	Cast, Arthur H.	11/1 3/48	WM7	City Driver
35	Sims, Clifford	10/12/68	WM7	City Driver
35	Geers, Otis D.	05/25/59	WM7	Local Driver

35	Gillam, A. H.	01/10/53	WM7	Local Driver	
35	Glasscock, Johnny B.	11/01/55	WM7	Local Driver	
35	Graham, Gary R.	11/14/66	WM7	Local Driver	
35	Virdell, Enoch	08/15/48	WM6	A—Mechanic	
35	Faulkner, Theo W.	11/06/65	WM1	Terminal Manager	
35	Bersosa, Jr., Elauterio	07/10/68	SM8	Serviceman	
35	Britt, Roy W.	02/15/54	WM5	Rate Clerk	
35	Lano, Jo A.	05/29/61	WF5	Lead Acct Clerk	
35	Cade, Nelda Y.	05/29/61	WF5	OSD Clerk	
35	Hoffman, Wanda A.	09/31/58	WF5	Accounting Clerk	
				STATION TOTAL	26

ETMF FREIGHT SYSTEM
Compliance Review 35-5-26
Date: 02/29/72
Station: Pecos, Texas
Occupation Code Sequence

STA	NAME	HIRE DATE	EEO	TITLE
36	Davis, Robert L.	07/24/53	WM7	Line Driver
36	Griffith, Jimmy D.	08/06/71	WM7	Line Driver
36	Raby, Ray T.	08/26/52	WM7	Line Driver
36	Taylor, Jerry M.	07/26/71	WM7	Line Driver
36	White, James R.	10/23/71	WM7	Line Driver
36	Anderson, Ardon A.	01/26/47	WM7	Line Driver
36	Thompson, Jack E.	02/03/48	WM7	Line Driver
36	Cox, D. C.	08/01/50	WM7	Line Driver
36	Hodge, Willard V.	01/09/48	WM7	Line Driver
36	Johnson, Norman C.	10/18/46	WM7	Line Driver
36	Rice, David A.	03/28/51	WM7	Line Driver
36	Schuch, Chester	09/01/39	WM7	Line Driver
36	Smith, Fred R.	04/06/49	WM7	Line Driver
36	Thomasson, Willis A.	09/19/51	WM7	Line Driver
36	Robinson, Don R.	07/13/69	WM7	Line Driver
36	Anderson, Elmo C.	03/15/63	WM1	Line Dispatcher

STATION TOTAL 16

ETMF FREIGHT SYSTEM
Compliance Review 35-5-26
Date: 02/29/72
Station: San Angelo, Texas
Occupation Code Sequence

STA	NAME	HIRE DATE	EEO	TITLE
37	Haynie, Fred R.	02/07/66	WM7	Line Driver
37	Mayhew, William	09/02/59	WM7	Line Driver
37	Montgomery, Joe W.	07/13/71	WM7	Line Driver
37	Pounds, Jr., Julius C.	07/10/71	WM7	Line Driver
37	Vail, Hiram J.	07/09/71	WM7	Line Driver
37	Morgan, Everett L.	04/25/59	WM7	Line Driver
37	Alberts, Jr., John P.	11/04/44	WM7	Line Driver
37	Arhelger, Clifton W.	04/20/44	WM7	Line Driver
37	Blackstock, Milton C.	01/26/58	WM7	Line Driver
37	Seibert, John J.	08/04/64	WM7	Line Driver
37	Kelley, Ira D.	05/08/54	WM7	Line Driver
37	Maurer, William J.	11/13/47	WM7	Line Driver
37	Pearcy, John R.	01/16/46	WM7	Line Driver
37	Sommerville, Lester S.	01/11/51	WM7	Line Driver
37	Robison, George W.	08/18/50	WM7	Line Driver
37	Wright, Dorman I.	02/21/36	WM7	Line Driver
37	Shafer, Calvin B.	04/11/44	WM7	Line Driver

37	Hickey, William R.	05/27/66	WM7	Line Driver
37	Lewis, Loren W.	05/05/52	WM7	Checker
37	Candler, John L.	01/15/39	WM7	City Driver
37	Ellison, Bob	10/13/52	WM7	City Driver
37	Hakowsky, Daniel J.	10/27/52	WM7	City Driver
37	Chriesmon, T. J.	03/17/52	NM7	City Driver
37	Hodge, Boyd H.	08/13/48	WM7	City Driver
37	Johnson, Ben H.	01/07/52	WM7	City Driver
37	Smith, Roy W.	03/06/52	WM7	City Driver
37	Ashley, Roy V.	03/05/51	WM7	City Driver
37	Baze, Samuel R.	08/02/50	WM7	City Driver
37	Billings, E. Glynn G.	06/05/61	WM7	City Driver
37	Bumpas, Donald D.	04/18/66	WM7	City Driver
37	Burrell, James B.	03/01/43	WM7	City Driver
37	Henkhaus, Robert P.	12/14/66	WM7	City Driver
37	Loyd, Sr., George E.	10/31/50	WM7	City Driver
37	Michalik, Edmond A.	08/13/52	WM7	City Driver
37	Rowoldt, Herman E.	04/22/52	WM7	City Driver
37	Smith, Elder M.	07/06/64	WM7	City Driver
37	Upton, Weldon E.	02/18/52	WM7	City Driver
37	Jung, Clarence E.	01/15/50	WM7	City Driver
37	Schwartz, Hartwell W.	12/03/56	WM6	A—Mechanic
37	Tijerina, Rohelip	07/28/47	SM6	A—Mechanic

37	Hudson, Lonnie H.	11/29/66	WM1	Terminal Manager
37	Chaney, Jr., Farmer A.	05/01/69	WM1	Dock Foreman/Supvr
37	Houpt, Henry H.	07/24/61	WM1	Dock Foreman/Supvr
37	Mizell, Carl R.	09/08/70	WM4	Salesman
37	Metzger, Max J.	10/24/55	WM5	Rate Clerk
37	Kemp, Howard W.	04/07/69	WM1	Line Dispatcher
37	Pearson, Floyd J.	12/18/38	WM1	Line Dispatcher
37	Lichnovsky, Wilma R.	11/15/54	WF5	Lead Acct Clerk
37	Schreiber, Clarence A.	04/28/61	WM5	OSD Clerk
				STATION TOTAL 49

ETMF FREIGHT SYSTEM
Compliance Review 35-5-26
Date: 02/29/72
Station: San Antonio, Texas
Occupation Code Sequence

STA	NAME	HIRE DATE	EEO	TITLE
38	Becerra, Julian	11/21/49	SM8	Checker
38	Castillu, Rudy T.	10/27/58	SM8	Checker
38	Cruz, Richard T.	11/16/59	SM8	Checker
38	Flores, Manuel M.	01/04/51	SM8	Checker
38	Valenzuela, Jose	06/01/55	SM8	Checker
38	Alderete, H. A.	07/25/66	SM7	City Driver
38	Bilton, Ralph C.	10/16/61	NM7	City Driver
38	Brooks, J. L.	09/20/65	NM7	City Driver
38	Brunce, Jr., Freddie	02/03/49	NM7	City Driver
38	Castillo, Conrad C.	08/05/69	SM7	City Driver
38	Delarosa, Cecil A.	06/01/58	SM7	City Driver
38	Delgado, Albert	06/29/64	SM7	City Driver
38	Faribault, J. A.	05/30/66	WM7	City Driver
38	Gamez, Manuel G.	02/28/66	SM7	City Driver
38	Gandara, Jr., M. R.	10/02/50	SM7	City Driver
38	Garza, A. E.	07/11/66	SM7	City Driver
38	Gomez, Trinidad M.	03/05/52	SM7	City Driver

38	Gutierrez, D. G.	05/03/65	SM7	City Driver
38	Guzman, Roy S.	07/18/66	SM7	City Driver
38	Hernandez, A. C.	04/18/66	SM7	City Driver
38	Herrera, Modesto	05/03/65	SM7	City Driver
38	Hoffman, Curtis W.	04/20/64	WM7	City Driver
38	Holtz, August P.	06/06/49	WM7	City Driver
38	Hughes, Isaac	07/08/45	NM7	City Driver
38	Jackson, Clarence	01/05/45	NM7	City Driver
38	Juarez, Frank S.	10/27/58	SM7	City Driver
38	Korzekwa, Louis A.	07/03/42	WM7	City Driver
38	Lopez, Raymond	03/06/52	SM7	City Driver
38	Marcell, Frank G.	08/12/63	SM7	City Driver
38	McCall, Jr., William	04/13/64	NM7	City Driver
38	Mills, Jin	07/01/50	NM7	City Driver
38	Morales, G. R.	08/21/59	SM7	City Driver
38	Navarro, Joe	10/07/63	SM7	City Driver
38	Pena, B. H.	11/01/66	SM7	City Driver
38	Pena, Herman	11/27/67	SM7	City Driver
38	Quiroz, C. G.	06/20/66	SM7	City Driver
38	Quiroz, Frank	08/30/65	SM7	City Driver
38	Renteria, R. G.	08/22/66	SM7	City Driver
38	Rios, Richard R.	09/01/64	SM7	City Driver
38	Rodriguez, Jr., Ben	05/03/65	SM7	City Driver

38	Rodriguez, Jesus	09/21/€	SM7	City Driver
38	Saldana, Louis	11/21/6	SM7	City Driver
38	Sanchez, Matias	07/10/66	SM7	City Driver
38	Santos, Maximo P.	08/30/65	SM7	City Driver
38	Silva, Joe	10/02/67	SM7	City Driver
38	Stanush, Emil J.	03/15/49	WM7	City Driver
38	Torres, John N.	07/08/63	SM7	City Driver
38	Torres, Albert G.	04/21/69	SM7	City Driver
38	Villareal, J. R.	11/15/65	SM7	City Driver
38	! ! ! ! — COPY NOT CLEAR — ! ! ! !			City Driver
38	Walker, S. P.	02/05/68	NM8	City Driver
38	Washington, Frank E.	03/10/64	NM7	City Driver
38	White, Willie L.	08/30/65	NM7	City Driver
38	Burrell, Jr., Raymond	11/12/49	WM6	Lead Mechanic
38	Yastic, Robert L.	09/30/68	WM6	A—Mechanic
38	Hammonds, Billy G.	10/11/71	WM6	B—Mechanic
38	Asbury, Ed A.	05/01/61	IM1	Terminal Manager
38	Hayden, Jakes R.	10/06/60	WM1	Dock Foreman/Supvr
38	Westhoefer, Richard E.	03/15/71	WM1	Dock Foreman/Supvr
38	Beterle, E. A.	10/27/58	WM1	Asst Terminal Mgr
38	Lynch, James P.	02/28/55	WM5	Rate Clerk
38	Woodall, Stayton H.	05/18/50	WM5	Rate Clerk
38	Fuller, Dewey C.	10/01/47	WM5	Lead Acct Clerk

38	Dvorak, Don B.	06/13/54	WM5	OSD Clerk	
38	Williams, Georgene R.	05/23/55	WF5	OSD Clerk	
38	Reinders, William B.	03/08/71	WM5	Bill Clerk	
38	Earnest, Elizabeth	06/12/49	WF5	Accounting Clerk	
38	Rodriguez, Thomas	10/30/59	SM9	Janitor	
38	Truitt, R. E.	03/11/55	WM1	District Sales Mgr	
				STATION TOTAL	69

ETMF FREIGHT SYSTEM
Compliance Review 35-5-26
Date: 02/29/72
Station: Texarkana, Texas
Occupation Code Sequence

STA	NAME	HIRE DATE	EEO	TITLE
39	Angel, Forrest G.	05/29/43	WM7	Line Driver
39	Meador, Charles D.	09/15/42	WM7	Line Driver
39	Orr, A. M.	02/02/48	WH7	Line Driver
39	Posey, Ralph	05/31/48	WM7	Line Driver
39	Roberts, C. E.	05/24/47	WM7	Line Driver
39	Latham, Warren	02/04/46	WM8	Checker
39	Bonner, Paul D.	09/24/68	WM7	City Driver
39	Bonner, James E.	06/28/67	WM7	City Driver
39	Herrington, Charles M.	10/22/69	WM8	City Driver
39	Jones, Jessie L.	07/31/69	WM7	City Driver
39	Latham, Hugh	06/20/66	WM7	City Driver
39	Latham, Joe M.	10/15/45	WM7	City Driver
39	Pierce, Charles R.	02/13/69	WM7	City Driver
39	Womack, J. E.	03/15/49	WM7	City Driver
39	Young, Billy F.	01/23/67	WM7	City Driver
39	Bradford, H. L.	08/25/48	WM7	Hostler (Spotter)

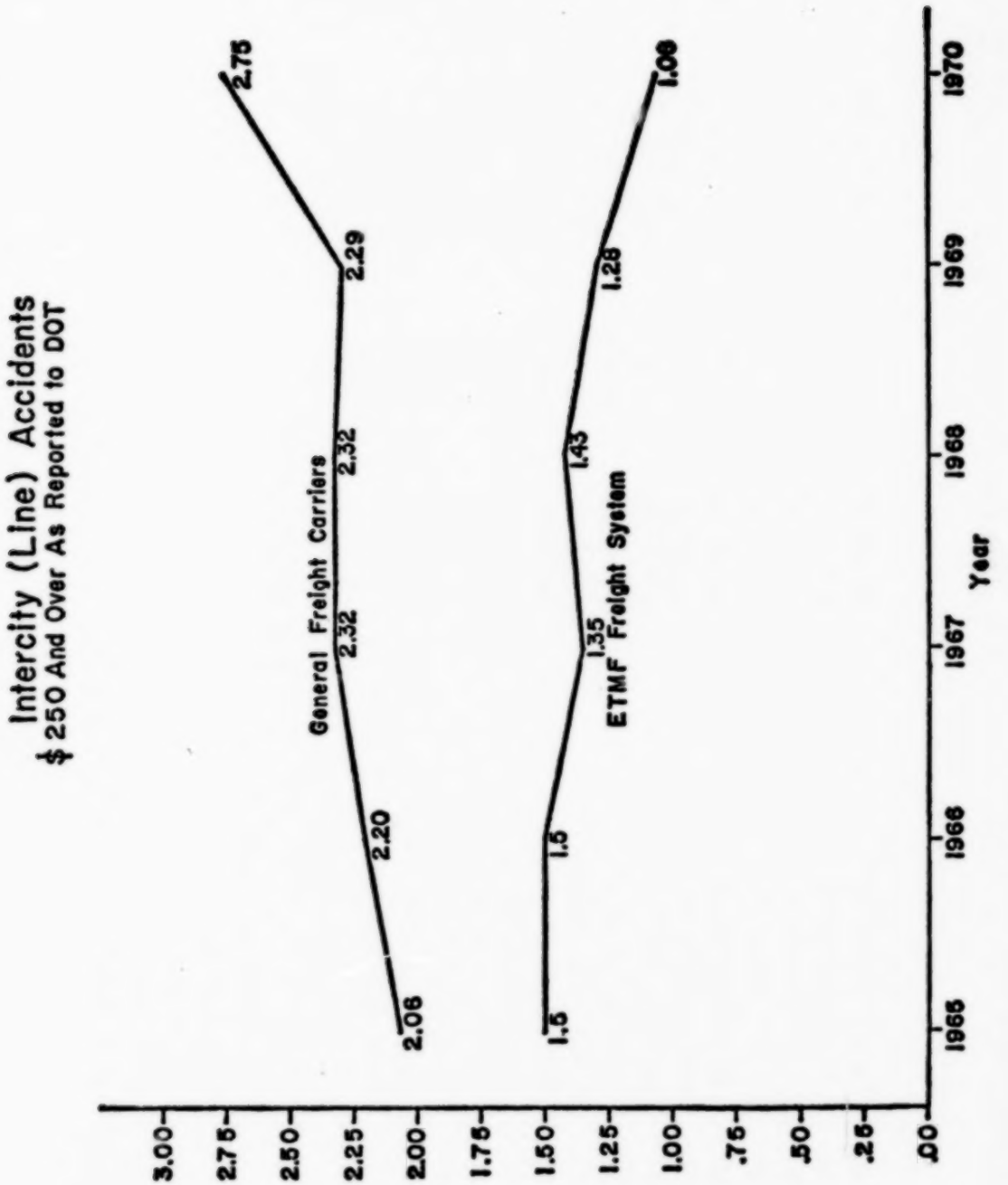
39	Bratton, Jesse D.	01/09/50	WM7	Hostler (Spotter)
39	Latham, Bennie	12/24/50	WM7	Hostler (Spotter)
39	Fullenwider, H. R.	05/05/48	WM6	Lead Mechanic
39	Hines, Charles D.	02/07/69	WM6	A—Mechanic
39	Myers, Walter N.	11/07/51	WM1	Terminal Manager
39	Huddleston, D. R.	01/10/46	WM1	Dock Foreman/Supvr
39	Riddle, T.	08/16/65	WM1	Dock Foreman/Supvr
39	Wyner, John C.	08/12/66	WM1	Dock Foreman/Supvr
39	Scott, Doris J.	04/14/65	WF5	Rate Clerk
39	Storey, Mary A.	03/05/52	WF5	Lead Acct Clerk
39	Roberts, George W.	08/31/70	WM5	General Clerk
				STATION TOTAL 27

ETMF FREIGHT SYSTEM
Compliance Review 35-5-26
Date: 02/29/72
Station: Tyler, Texas
Occupation Code Sequence

STA	NAME	HIRE DATE	EEO	TITLE
40	Foreman, D. W.	08/07/47	WM8	Checker
40	Box, Max R.	08/18/69	WM7	City Driver
40	Caldwell, Ronald L.	02/25/69	WM7	City Driver
40	Deville, Napoleon	10/04/65	WM7	City Driver
40	Edgar, James E.	08/06/53	WM7	City Driver
40	Elwood, Bonnie L.	07/03/67	WM7	City Driver
40	Hall, Jimmie T.	07/22/68	WM7	City Driver
40	Hartman, Danny R.	09/23/68	WM7	City Driver
40	Hayes, James E.	04/07/48	WM7	City Driver
40	Hayes, Loyd E.	09/28/59	WM7	City Driver
40	Jones, Bennie R.	10/03/55	WM7	City Driver
40	Kirkpatrick, L.	10/28/68	WM7	City Driver
40	Lee, Charles S.	12/01/69	WM7	City Driver
40	Lee, Robert E.	05/13/59	WM7	City Driver
40	Leifer, Mark H.	08/22/66	WM7	City Driver
40	Lusk, James H.	08/09/52	WM7	City Driver

40	McClenny, Virgil	09/06/66	WM7	City Driver
40	McGehee, J. E.	03/21/49	WM7	City Driver
40	Morphis, N. A.	03/28/50	WM7	City Driver
40	Sanders, J. T.	09/05/56	WM7	City Driver
40	Thompson, James F.	02/24/69	WM7	City Driver
40	Whitaker, Wayne C.	07/24/67	WM7	City Driver
40	Henry, Harold D.	08/24/59	WM1	Terminal Manager
40	Wright, Carl D.	03/30/62	WM1	Dock Foreman/Supvr
40	Pulley, Billy R.	02/01/62	WM1	Terminal Sprdnt
40	Gilbert, Evelyne	07/26/65	WF5	Rate Clerk
40	Berryhill, Dennis R.	02/04/69	WM5	OSD Clerk
				STATION TOTAL 27

DEFENDANT'S EXHIBIT AAAA



DEFENDANT'S EXHIBIT FFFF

73-2801

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL ACTION No. SA 71 CA 302

JESSE RODRIGUEZ, ET AL., *Plaintiffs*

VS.

EAST TEXAS MOTOR FREIGHT, ET AL., *Defendants*

Stipulation

All parties enter into the herein stipulation.

1. The Plaintiffs were employed at the San Antonio terminal of East Texas Motor Freight without regard to their race, color or national origin.

2. The no-transfer rule is uniformly applied without regard to race, color or national origin.

3. The standards and qualifications of East Texas Motor Freight for its road drivers are not discriminatory.

4. Except for one road driver employed by Valley Copperstate, who was transferred from San Antonio immediately after the merger with East Texas Motor Freight, East Texas has never had any road drivers domiciled in San Antonio.

5. That prior and subsequent to the effective date of Title VII of the 1964 Civil Rights Act to the date that Jesse Rodriguez filed a charge of discrimination with the Equal Employment Opportunity Commission, East Texas Motor Freight had never employed a Negro or Mexican-

American as a line driver in the State of Texas, covered by the Southern Conference Area Supplemental Agreement.

6. Except to being received and filed locally by then Terminal Manager Sager in August 1970, East Texas Motor Freight has never considered the written applications for employment as road drivers of the Plaintiffs and Trinidad Gomez. Such applications were transmitted to the Dallas corporate office of East Texas Motor Freight subsequent to the filing of the Equal Employment Opportunity Commission charges involved herein.

7. The claim of discrimination of the Plaintiffs is solely based upon the fact that after their original employment, they have been "locked in" to the lower paying job of city driver and denied a job as line driver because of:

(a) The maintenance of separate seniority rosters for city and line drivers;

(b) The fact that any city driver regardless of his race, if he transferred from city driver classification to a road driver classification, loses his accumulated city seniority;

(c) The Defendant East Texas Motor Freight discouraged inquiries from Plaintiffs concerning the qualifications and/or availability of line driving jobs;

(d) The fact that the Defendant East Texas Motor Freight had always employed Anglo/white applicants as road drivers;

(e) That the company's policy and practice of recruiting line or road drivers has been based to a great extent on a word of mouth system. Since the company's line drivers and supervisory terminal personnel are almost exclusively Anglo/white, such a

practice has continued the alleged illegal exclusion of Mexican-Americans and Negroes as road drivers;

8. That the only issue presently before the Court pertaining to the company is whether the failure of the Defendant East Texas Motor Freight to consider Plaintiffs' line driver applications constituted a violation of Title VII and 42 U.S.C. § 1981.

The foregoing stipulation is without prejudice to the right of any party to object to any of the facts stipulated herein on the ground of relevance or materiality.

DEFENDANT'S EXHIBIT L

RACIAL COMPOSITION OF COLLECTIVE BARGAINING UNIT
REPRESENTED BY LOCAL UNION 657
UNDER NATIONAL MASTER FREIGHT AGREEMENT
AND SUPPLEMENTS

January, 1965—January, 1972

	Anglos	Mexican-Americans	Negroes
1965	185	179	47
1966	188	184	52
1967	186	187	53
1968	186	195	47
1969	169	190	47
1970	165	195	48
1971	169	203	49
1972	178	218	38

DEFENDANT'S EXHIBIT M

RACIAL COMPOSITION OF TOTAL MEMBERSHIP OF
TEAMSTERS LOCAL UNION 657
SAN ANTONIO, TEXAS

January, 1965—January, 1972

	Anglos	Mexican-Americans	Negroes
1965	392	322	67
1966	432	490	120
1967	447	571	130
1968	438	746	105
1969	430	812	114
1970	426	697	115
1971	729	718	108
1972	543	639	103

DEFENDANT'S EXHIBIT N

RACIAL BREAKDOWN OF TRUCK DRIVERS WORKING FOR EAST TEXAS MOTOR FREIGHT WITHIN JURISDICTION AND MEMBERSHIP OF TEAMSTERS LOCAL 657

January, 1952 to January, 1972

CITY DRIVERS

	Anglos	Mexican-Americans	Negroes
1952	1	12	0
1953	1	10	0
1954	1	11	0
1955	1	10	1
1956	1	10	1
1957	4	21	0
1958	2	16	0
1959	5	16	0
1960	5	18	0
1961	3	19	0
1962	2	17	0
1963	2	18	0
1964	2	23	1
1965	2	22	1
1966	2	34	2
1967	1	35	4
1968	1	35	4
1969	3	35	4
1970	14	35	10
1971	15	29	11
1972	14	33	9

ROAD DRIVERS

1952-1969	None	None	None
1970	1	None	None
1971	None	None	None
1972	None	None	None

BEST COPY AVAILABLE

DEFENDANT EXHIBIT P

433

International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America

DOES GRANT THIS

Local Union Charter

To R. C. Shuler, N. E. Snell, W. O. Zander, Sabas Martinez, I. H. Garza, Louise Shuler, W. W. Law

and to their successors legally qualified to constitute Local Union No. 657 the work jurisdiction title of which is Teamsters, Chauffeurs, Warehousemen, Helpers and Food Processors

and the geographical jurisdiction of which is The counties of San Patricio, Karnes, Bexar, Travis, Nueces, Edwards, Medina, Uvalde, Hidalgo, and contiguous counties and also Kleberg and Lampasas Counties, Texas.

This Local Union shall be organized for the purpose of achieving the objects set forth in the International Constitution.

This Local Union shall be empowered to adopt Bylaws, negotiate contracts covering wages, hours, and conditions of employment in accordance with the laws, wages and requirements of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and in accordance with the best interests of the labor movement.

The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America grants this charter with the understanding that should the parties receiving it, or their successors, fail to comply with the provisions herein set forth, or with the Constitution, laws, wages and requirements of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, this charter will be revoked and they shall be required to turn over all books, documents, property and funds to the General President or his representative, or to the General Secretary-Treasurer of the International Union, and should Local Union No. 657 neglect, forfeit its charter, or dissolve or be dissolved, or suspended, or forfeit its charter, then all books, documents, property and funds shall likewise be turned over to the General President, or his representative, or to the General Secretary-Treasurer in accordance with the applicable provisions of the International Constitution.

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

hereby binds itself to support Local Union No. 657 in the exercise of its rights, privileges and prerogatives.

In Witness Whereof, We have subscribed our names and affixed the SEAL of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, this 12th day of July A. D., 19 65

Original Charter: 4/3/37
Revised Charter: 4/22/42

General President

General Secretary-Treasurer

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

UNITED STATES OF AMERICA, *Plaintiff*,

v.

EAST TEXAS MOTOR FREIGHT SYSTEM, and THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA and THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, *Defendants*.

CIVIL ACTION NO. 3-6025-B

JUDGE HUGHES

Consent Decree

Plaintiff United States of America filed its Complaint on June 29, 1972, alleging that defendants East Texas Motor Freight (hereinafter referred to as ETMF or the Company), the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and the International Association of Machinists and Aerospace Workers were engaged in a pattern and practice of discrimination in employment, in violation of Title VII of the Civil Rights Act of 1964, as amended, and Executive Order 11246, as amended. Defendant ETMF has denied said allegations. This Court has jurisdiction of the parties and of the subject matter in this action. This Decree, being issued with the consent of the defendant(s), shall not constitute an adjudication or finding on the merits of the case and shall in no manner be construed as an admission by defendants of any violation of said Title VII or of any similar Act or of said Executive Order 11246. This Decree shall be binding upon the parties hereto, and it is their intention to fully settle by this Decree all issues

raised by the Plaintiff in its complaint and occurring prior to the entry of this Decree.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT

General Provisions

1. Defendant ETMF and its officers, agents, employees, successors, and all persons in active concert or participation with them, are enjoined from engaging in any act or practice which has the purpose or effect of discriminating against any individual because of his race, color or national origin. Defendant ETMF shall hire, assign, promote, transfer and dismiss employees at its facilities without regard to race or national origin, and shall not discriminate against any individual at any of its locations because of such person's race or national origin.

2. Defendant ETMF shall designate a corporate official who shall be responsible for directing compliance with this Decree. ETMF shall provide Plaintiff with his or her name within 30 days of the date of entry of this Decree. If the Company subsequently changes its executive assignment, it shall promptly notify Plaintiff as to the new responsible Company official. In each terminal, the Terminal Manager (and the Regional Maintenance Supervisor, where appropriate) is the official responsible for completing the corporate officials' directions regarding compliance with this Decree.

Qualifications for Employment

3. The qualifications for city driving positions shall be those set forth in the Department of Transportation's Motor Carrier Safety Regulations, Title 49, Part 391, Sections 391.11 and 391.15. No black or Spanish-surnamed applicant for a city driving position who meets these qualifications shall be deemed insufficiently experienced for such a position if he has related experience driving equipment comparable to that to be operated on the job and has the appropriate state driver's license. In determining

equivalence, ETMF shall consider such factors as military driving experience and graduation from a truck driving school. The Company need not accept for equivalency purposes the fact of graduation from a particular truck driving school which is not dependable as a likely source of drivers who can meet the qualifications approved in this Decree. Nothing herein shall bar ETMF from rejecting the applicant for transfer or hiring to a city driving job because his driving record shows a pattern of risk or illegal operation, that the Company is required by law to avoid for prospective and incumbent employees under Title 49 Section 391, Subparts B and C of the Department of Transportation's Motor Carriers Safety Regulations. The parties understand that Plaintiff is entitled to develop, in the event of a contest under this clause, facts showing a relvant pattern of hiring standards inconsistent with the judgment of disqualification by the Company in the contested case.

4. ETMF may not reject a black or Spanish-surnamed applicant as unqualified for the position of dockmen, checker, or serviceman (or job titles expressing the same functions) merely because he has no prior experience in the position sought or in the trucking industry, so long as he has sufficient education or experience as to make it reasonably likely that he can perform the duties of the job.

5. Applicants for office and clerical positions may be required to pass objective, practical tests which measure the skills which they will need on the job sought. Practical tests are exemplified by typing, shorthand and office machine tests. ETMF may not reject a black or Spanish-surnamed clerical applicant as unqualified for entry level office and clerical positions merely because the applicant has no prior experience in the position sought or in the trucking industry, so long as such applicant has sufficient education or experience as to make it reasonably likely that such person can perform the duties of the job.

6. ETMF may set for over-the-road driving positions those qualifications as are contained in the Department of Transportation's Motor Carrier Safety Regulations (D.O.T.), Title 49, Part 391, (Sections 391.11, 391.15). ETMF may refuse employment to any applicant who is under 25 years of age or who does not meet ETMF's two-year driving experience requirement, or whose driving record shows a pattern of risk or illegal operation. Twelve months after the commencement of this Decree, the Company may increase those minimum qualifications again to 26 years of age and 2½ years of proximate prior road experience, if the Company is meeting the hiring goals set forth elsewhere in this Decree for increasing minority road drivers through transfer and recruitment; at 24 months after the commencement of this Decree, the Company may return its minimum requirements to 27 years of age and 3 years proximate prior road driving experience if it is meeting the hiring goals for road drivers contained in Paragraph 19 of this Decree. Nothing herein shall bar ETMF from rejecting an applicant for transfer or hiring to a road driving job because his driving record shows a pattern of risk or illegal operation, that the Company is required by law to avoid for prospective and incumbent employees under Title 49 Section 391, Subparts B and C of the D.O.T. Regulations. The parties understand that Plaintiff is entitled to develop, in the event of a contest under this clause, facts showing a relevant pattern of hiring standards inconsistent with the judgment of disqualification in the contested case. Minority applicants for over-the-road positions shall be deemed to meet ETMF's experience requirement if they have the equivalent of two years tractor-trailer experience. ETMF shall consider such factors as military driving experience, graduation from an accredited truck driving school, and city semi-trailer driving at highway speed experience and/or casual over-the-road experience when determining an applicant's comparable driving experience. The Company need not accept for equivalency purposes graduation from a particular

truck driving school which is not dependable as a likely source of drivers who can meet the qualifications set forth in this Decree.

7. ETMF may continue to give the Department of Transportation written safety test to all applicants; however, passing the test shall not be a qualification for employment unless the Department of Transportation revises its Motor Carrier Safety Regulations, Title 49, Part 391, to so provide.

High School Diploma and Intelligence Test

8. No black or Spanish-surnamed applicant shall be disqualified for employment solely because he has an arrest record or does not have a high school diploma or the equivalent, unless the job reasonably requires a high school diploma. The jobs of the Road Driver, City Driver, Dockman, Checker, Spotter, Mechanic, Partsman, Helper, Serviceman, and Janitor shall not be deemed reasonably to require a high school disploma. Applicants for the above jobs may be required, however, to be able to read and write sufficiently well to perform the duties of the job.

9. A high school diploma or the equivalent may be required for all executive, managerial, supervisory, technical, sales and clerical positions, except for working foremen in a mechanical shop or for dock foremen. Such factors as military experience or satisfactory prior employment which requires performance at the level of a high school diploma shall be factors considered in determining high school equivalency. In evaluating the qualifications for applicants for salesmen positions, ETMF shall give consideration to sales experience acquired in areas other than the trucking industry.

10. ETMF may not give any general intelligence or aptitude test to applicants that has not been validated in accordance with the provisions set forth in the Equal Employment Opportunity Commission's *Guidelines on Em-*

ployee Selection Procedures, 35 Fed. Reg. 12333, et seq.; 29 C.F.R. §§ 1607.1 to 1607.14. Before ETMF imposes more stringent qualifications than those listed in Paragraphs 3, 4, 5, 6 and 7 above, it shall give Plaintiff written notice of the intended changes and the reasons therefor at least forty-five (45) days before such qualifications are imposed.

Recruiting

11. ETMF shall undertake an employee recruiting program aimed at the black and Spanish communities in each city where ETMF maintains a terminal. Within forty-five (45) days of the date of entry of this Decree, ETMF shall contact organizations in the black and Spanish communities, such as the Urban League, the National Association for the Advancement of Colored People, and SER (Jobs for Progress, Inc.) etc., and shall also contact local job training organizations, and local truck driving schools as limited in Paragraphs 3 and 6 above, and inform each such organization and school of its employment standards and application process and of its desire to hire qualified black and Spanish employees, and that it will contact the organization or school for referrals whenever job vacancies occur or are reasonably anticipated. ETMF shall give each organization and school a statement setting forth the minimum qualifications for each job classification and a copy of the Company's equal employment opportunity statement described elsewhere in this Decree. Thereafter, whenever new employees are being hired for any job classification at an ETMF terminal, the terminal manager or his designee shall notify said community organizations and job training organizations immediately upon determining that job vacancies exist, and shall also notify such truck driving schools if new drivers are to be hired, in order to give said organizations and schools an opportunity to refer qualified black and Spanish-surnamed applicants. When ETMF needs additional employees, it shall give the applicable local union equal opportunity along with other

sources to provide suitable applicants if it has a referral hall, but ETMF shall not be required to hire those referred by the local union [unless mandated by applicable union contract]. The exception described in brackets is an issue to be decided by the Court.

12. ETMF shall not hire a white applicant for a vacancy in any job classification if such applicant's qualifications are less than the minimum qualifications for such job classification as provided to organizations and schools pursuant to Paragraph 11 above, unless such organizations and schools are first notified of the reduced minimum qualifications in time to give them a reasonable opportunity to refer applicants possessing the lesser qualifications.

13. If the organizations and schools notified pursuant to Paragraph 11 above fail to develop an adequate number of qualified black or Spanish-surnamed applicants for each job classification at a particular terminal, ETMF shall undertake an advertising program in newspapers directed to and having general circulation in the minority community. Radio communications are optional with the Company during the first year of this Decree; however, radio communications beamed to minority audiences shall be used thereafter if ETMF is not substantially meeting the hiring goals set forth herein.

14. ETMF shall recruit for its management and supervisory positions, in a manner which affords employment opportunities to black and Spanish-surnamed persons, including giving full and fair notice of opportunities to such sources as are likely to produce qualified black and Spanish-surnamed applicants for such positions. If the Company engages in college recruiting, it shall include colleges with substantial black and Spanish-surnamed student bodies among the colleges visited.

Hiring Procedures

15. ETMF shall accept applications from all black and Spanish-surnamed applicants who inquire about employment regardless of whether job vacancies exist. ETMF shall also accept applications for road driver positions at terminal locations where such locations have in the past been utilized as applicant sources for other ETMF terminal locations. The employee who accepts the application shall immediately review it for completeness and ask the applicant to provide any missing information. ETMF shall keep such applications in a current file for at least three months and shall give applicants adequate and timely notice of vacancies.

16. The responsible Company official shall review the application of each applicant to determine whether he meets the Company's minimum qualifications. Within 21 days of the date of the application, the official shall mail each black or Spanish-surnamed applicant a notice stating:

(a) That his application has been received and will be considered as vacancies occur. The application will be kept on file for three months and may be renewed in person or by letter. Nothing in this letter is intended to accord to the applicant seniority rights under the collective bargaining agreement.

(b) If on the face of the application the applicant does not meet the minimum basic standards for the position for which he is applying, the Company shall note the deficiency in its response to the applicant. The Company shall retain all copies of all correspondence for a period of 12 months.

The Affected Class

17. For the purposes of relief in this cause, the Affected Class shall consist of the following persons:

A. Such black or Spanish-surnamed city drivers, hostlers, checkers and garage employees who are domiciled

at a terminal where road drivers are presently domiciled or where road drivers have been, since July 2, 1965, domiciled under either ETMF or a predecessor company.

B. Such persons who are incumbent city employees employed at a non-road driving terminal who have, since July 2, 1965, indicated a desire to transfer to the road.

C. The black and Spanish-surnamed applicants for various positions at ETMF who are listed on Appendix C. This subclass may include additional such applicants as the parties may agree, or the Court may determine.

D. The persons who are listed on Appendix D.

Transfer Procedure

18. A. Within thirty (30) days after the seniority rights issue has been determined by a final Order of the Court herein, ETMF shall notify all Affected Class members set forth in Paragraph 17 A and B, informing those persons of whatever seniority relief is to be provided pursuant to the Court's Order. Thereafter, each Affected Class member set forth in Paragraph 17 A and B will be afforded thirty (30) days to indicate an interest in transferring to the road driver classification at the terminal in which he is employed (if that terminal has an over-the-road operation) or at a terminal within the job market, or to a terminal of his choice (if the terminal at which he is employed has no over-the-road operation) with the seniority rights provided by the Court Order.

Within thirty (30) days after expiration of the period for responding to the Company's notification, the Company shall determine whether those Affected Class members set forth in Paragraph 17 A and B are qualified for employment as road drivers pursuant to the terms of Paragraph 6 of this Decree.

An Affected Class member who transfers into a road driving position shall be subject to a thirty (30) day probationary period. During that time, ETMF may determine that the person is not qualified to drive or the person may decide that he does not wish to continue in the new position. In either event, he shall have the right to return to his former job without loss of seniority during said thirty (30) day period.

B. Within thirty (30) days after the entry of the Court's Order determining whatever seniority relief is to be granted to members of the Affected Class as set forth in Paragraph 17 C, the Company shall notify such members of the Court's Order and the opportunity for employment with ETMF at the terminal at which he applied or at a terminal within the job market of that terminal pursuant to the Court's Decree. Thereafter, each member of the subclass shall be afforded thirty (30) days to respond to the Company's notification and indicate an affirmative interest in employment with ETMF. Thereafter, the Company will within fifteen (15) days of the expiration of the period for indications of interest, transmit to such members of such subclass an application form, which form will be processed by the Company and a determination made regarding the applicant's qualifications for employment under the terms of said Order.

The Company shall notify the applicant of the disposition of his application within thirty (30) days of the Company's receipt of such application and in all cases where the applicant is not determined to be qualified for employment, the Company shall notify Plaintiff of the reasons therefor within seven (7) days of such determination by the Company. An Affected Class member who declines after seniority rights have been determined to fill a position offered in accordance with the terms of this subsection or who fails to report to work as initially scheduled, except for illness or other good cause, shall be considered for further employment solely as a new applicant. All disputes between parties concerning Affected Class members' quali-

fications for employment will be submitted to the Court for determination.

C. Affected Class members as identified in Paragraph 17 A, B and C who have indicated an interest in transferring to the road driving classification or have applied for a road or city position, shall be allowed a reasonable time if desired to become familiar, on the employee's non-working time, with ETMF equipment before taking any driving test.

D. Whenever a vacancy occurs at a terminal for which a qualified Affected Class member, as identified in Paragraph 17 A, B, or C has indicated interest under the Court's order, the Company shall offer employment (which offer shall remain open for not more than seven (7) calendar days) to such Affected Class member in order of such Affected Class member's seniority date, which date is to be determined by final Order of the Court. Plaintiff asserts, and ETMF will not oppose but leaves for determination by the Court, that the term "vacancy" as used herein refers to any position created or caused by ETMF at any location throughout its system: (1) by an increased need for employees; (2) by the recall of employees on layoff; or (3) through a change in ETMF's method of doing business.

E. An Affected Class member as identified in Paragraph 17 A, B, or C who declines after seniority rights have been determined to fill a position offered in accordance with the terms of this paragraph or who fails to report for work as initially scheduled, except for illness or other good cause, shall be considered for further employment solely as a new applicant.

F. Any person accepting relief under this paragraph waives all rights to monetary relief other than that which is provided in this decree.

Hiring Ratios and Goals

19. A. Road Drivers

Subject to the availability of qualified black or Spanish-surnamed applicants at the particular terminal where a vacancy occurs, ETMF shall adopt and seek to achieve a goal of hiring black and Spanish-surnamed persons who are qualified in accordance with this Decree for the road driver classification, at the rate of fifty persent (50%) of all hired in such classification until the percentage of black or Spanish-surnamed persons in the road driver classification at the said terminal is equal to the percentage of black or Spanish-surnamed persons in the adult workforce population of the city (or standard metropolitan statistical area (SMSA), if the city in which the terminal is located is in close proximity to or within an SMSA) where the terminal is located. The work force population percentages referred to within paragraph 19 shall be based on the "United States Bureau of the Census-Detailed Population Characteristics (Time Report PC (1-B))" for the 1970 Census unless ETMF or Plaintiff can show that any percentages contained therein are not substantially reflective of the relevant black or Spanish-surnamed work force figures for a given city. Plaintiff shall provide ETMF with a copy of said Report as soon as it becomes available.

B. City Positions

Subject to the availability of qualified black or Spanish-surnamed applicants at the particular terminal where a vacancy occurs, ETMF shall adopt and seek to achieve a goal of hiring black and Spanish-surnamed persons who are qualified in accordance with this Decree for the positions of City Driver, Dockman, Hostler or Checker at a rate of fifty percent (50%) of all hired city employees at the following terminals: Atlanta, Georgia; Birmingham, Alabama; Detroit, Michigan; Little Rock, Arkansas; Longview, Texas; Phoenix, Arizona; St. Louis, Missouri and Shreveport, Louisiana. At each such terminal, the above

rate of hiring shall continue until the percentage of black or Spanish-surnamed persons in city positions at that terminal is equal to the percentage of black or Spanish-surnamed persons in the adult work force population of the city or SMSA, if the city in which the terminal is located is in close proximity to or within an SMSA where the terminal is located.

C. Garage Positions

In those cities where garage positions taken as a whole are filled by minorities in a proportion less than one-half (½) of the 1970 Census minority percentage for adult workers, the Company agrees to the following affirmative action:

Subject to the availability of qualified black or Spanish-surnamed applicants at the particular terminal where a vacancy occurs, ETMF shall adopt and seek to achieve a goal of hiring black and Spanish-surnamed persons who are qualified in accordance with this Decree at the rate of twenty-five percent (25%) of all new hires until the percentage of minorities in garage positions taken as a whole in the particular terminal are equal to the 1970 Census minority percentage for adult workers. The parties understand that for the efficient operation of the business, it is necessary that an applicant for advanced garage positions possess the necessary skills to perform the duties of the then-existing vacancy.

D. Entry Level Administrative Positions

Subject to the availability of qualified black or Spanish-surnamed applicants at the time of a vacancy, the Company shall adopt and seek to achieve a goal of hiring black and Spanish-surnamed persons who are qualified in accordance with this Decree for entry-level administrative positions, on a terminal-by-terminal basis, at the rate of twenty percent (20%) of all such persons hired and promoted for those positions until the percentage of black or Spanish-surnamed persons in those positions, on a terminal-by-

terminal basis, is equal to the percentage of black or Spanish-surnamed persons in the adult workforce population of the city or SMSA, if the city in which the terminal is located is in close proximity to or within an SMSA where the terminal is located. As used herein, "Entry Level Administrative Positions" shall refer to dock foremen and to those positions which are normally filled by outside hiring not requiring any significant amount of prior experience.

E. Entry Level Clerical Positions

Subject to the availability of qualified black and Spanish-surnamed applicants at the time of a vacancy, ETMF shall adopt and seek to achieve a goal of hiring black and Spanish-surnamed persons who are qualified in accordance with this Decre for clerical positions on a terminal-by-terminal basis at the rate of twenty-five percent (25%) of all such persons hired or promoted for such positions until the percentage of black or Spanish-surnamed persons in those positions, on a terminal-by-terminal basis, is equal to the percentage of black or Spanish-surnamed persons in the adult work force population of the city (or SMSA if the city in which the terminal is located in close proximity to or within an SMSA) where the terminal is located.

20. ETMF shall use its best efforts to hire minority casual employees, if needed, but casual employees shall not be counted in determining the achievement of goals. Contract recall rights of employees on layoff shall not be adversely affected by this paragraph.

Preserving Records

21. ETMF will maintain records of all applications, hiring, initial job classifications, promotions, transfers between job classifications and dismissals. The Company will record the reasons for terminations of an employee or disqualification of an applicant and maintain that record for at least one year.

Financial Compensation to Affected Class Members

22. A. ETMF agrees to furnish the sum of $175,000 in full and final settlement as between the parties of its alleged obligation to provide back pay to Affected Class members as that class is described in Paragraph 17 herein. Any such person accepted a designated portion of said settlement shall sign a release stating that such designated portion is accepted in full and final settlement of all claims for monetary compensation, back pay or any other type of relief against ETMF or any predecessor corporation based upon any pending litigation or other alleged discriminatory actions because of race or national origin occurring prior to the date such release is signed. The signing of such release by an Affected Class member shall constitute a waiver of any rights as to monetary compensation, back pay or any other type of relief not otherwise specifically provided for herein against ETMF or any predecessor corporation which may have accrued to the Affected Class member, and also constitutes an agreement to be bound by a future decree entered herein as to any other relief of a non-monetary character.

B. There are attached hereto as Appendices A, B, C, and D, lists filed by Plaintiff with the Court, of all Affected Class members. Within thirty (30) days from entry of this Decree, Plaintiff will file with the Court and provide to ETMF the designated portion(s) of said monetary settlement as has been provided in Paragraph A above, which shall be offered to each Affected Class member on said lists. Said lists shall become a part of this Decree as if fully incorporated herein. In addition to the challenges to subclass participation allowed by Paragraphs 17 and 18, the Company may challenge the propriety of the individual amount designated for any subclass member to avoid extreme relative inequity or irrational allocation. Such challenge must be filed with Plaintiff within fifteen (15) days of receiving lists required above in this paragraph. There will be no less than fifteen (15) days for

discussion between the parties. Unresolved disputes are to be submitted to the Court for resolution. In the event of a dispute over relative amounts of back pay under this paragraph, the Company shall have the burden of persuasion by clear and convincing evidence.

Following final agreement between the parties, or pursuant to an Order of the Court in the event of a dispute hereunder, on the designated amount for each subclass member, ETMF shall provide Plaintiff with a group of certified checks payable to the class members respectively. The form of that check shall incorporate by reference the release and waiver provisions of this Decree.

In the event that an Affected Class member does not accept the designated portion of said settlement, it shall be returned to ETMF. In the event that any Affected Class member does not sign a release within ninety (90) days of Plaintiff's notice to Affected Class members, which notice shall be sent within thirty (30) days of entry of this Decree, that class member shall forfeit and forever forego any monetary relief provided pursuant to this Decree, but shall retain his individual rights.

C. Each party to this Decree is to pay its own costs of litigation, and the Department of Justice shall pay the court costs incurred to the date of entry of this Decree.

Reporting

23. Within forty-five (45) days after entry of the Decree, Defendant ETMF shall serve upon Plaintiff a report stating the total number of employees by classification, race or national origin, and date of hire for each terminal and corporate office as of that date. Within thirty (30) days after the end of each succeeding four-month period, and until such time as this Decree is dissolved, Defendant ETMF shall serve upon Plaintiff a report for each terminal and the general office showing by job classification and race:

A. The total number of employees at the end of the period.

B. The number of persons by race or national origin and the number of persons by race or national origin terminated during the period.

C. The number of applicants by race or national origin for employment who were not hired during the period, and the number of applications by race or national origin pending at the end of the period.

D. For members of the Affected Class, a report showing (1) whether he transferred to another job classification during the period; (2) whether he qualified for the new position, was disqualified and a brief description of the reason for the disqualification, or why he decided to return to his former classification, if the Company knows; (3) his status at the end of the period.

E. All notices and reports required by this Decree shall be mailed to the Chief, Employment Section, Civil Rights Division, United States Department of Justice, Washington, D.C. 20530, unless notified otherwise by counsel for Plaintiff.

Court Supervision

24. During the pendency of this Decree, ETMF shall be subject to the jurisdiction of this Court or its designee for the purpose of determining its compliance herewith and with Executive Order 11246 with respect to the subjects covered by this Decree, and shall not be required to submit reports with the United States Postal Service as required by Executive Order 11246 and the Regulations thereunder.

Posting

25. ETMF shall post a copy of this Decree, together with a statement of the Company's equal employment opportunity policy, on all employee bulletin boards at each of its terminals. The statement shall include a summary of the rights of members of the Affected Class.

Opportunity for Adjustment of Deficiencies

26. Plaintiff will give ETMF thirty (30) days' notice and opportunity to investigate and correct or refute any alleged violation of this Decree which comes to the attention of the Department of Justice, before applying to the Court for a Court Order on account of any such alleged violation.

Non-Reprisal Pledge

27. Defendants shall not discriminate or retaliate in any manner against any employee or applicant who has furnished information or participated in any respect in the investigation of the defendants' employment practices in connection with this action or any other Title VII proceeding.

Duration

28. The Court retains jurisdiction of this action for such further relief or other orders as may be appropriate. At any time after four (4) years subsequent to the date of entry of this Decree, the defendants, or any of them, may move this Court, on due notice, for dissolution of this Decree upon a proper showing.

ENTERED at Dallas, Texas, this —— day of January 1974.

United States District Judge

BY CONSENT:

For Plaintiff United States of America:

/s/ SQUIRE PADGETT
DAVID L. ROSE
SQUIRE PADGETT
JOHN M. GADZICHOWSKI
Attorneys
Department of Justice
Washington, D.C. 20530

For Defendant East Texas Motor Freight, Inc:

/s/ GEORGE E. SEAY
George E. Seay, Esquire

/s/ WILLIAM C. STROCK
William C. Strock, Esquire
SEAY, GWINN, CRAWFORD & MEBUS
Dallas Federal Savings Building
Dallas, Texas 75201

/s/ RICHARD C. HOTVEDT
Richard C. Hotvedt, Esquire

/s/ HARRY A. RISSETTO
Harry A. Rissetto, Esquire
MORGAN, LEWIS & BOCKIUS
1140 Connecticut Avenue, N.W.
Washington, D.C. 20036

/s/ ROBERT H. MAIER
Robert H. Maier
Vice President, Training & Personnel
East Texas Motor Freight System
2355 Stemmons Freeway
Dallas, Texas 75207

For Defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America:

L. N. D. WELLS, Esquire
MULLINAX, WELLS, MAUZY & BAAB, INC.
8204 Elmbrook Drive, Suite 200
Dallas, Texas 75247

For Defendant International Association of Machinists and Aerospace Workers:

RELEASE

For and in consideration of the sum of $———— to be paid me this date by East Texas Motor Freight (hereinafter referred to as ETMF) upon the execution of this Release, in accordance with the provisions of the Consent Decree Entered in Partial Resolution and any subsequent Court Order in the suit styled "United States v. East Texas Motor Freight, et al., Civil Action No. 3-6025-B, in the Northern District of Texas," I, ————————, hereby release and discharge ETMF and/or any predecessor company from all liability for injunctive or any other affirmative relief, back pay, or other monetary relief arising out of alleged discriminatory employment practices, occurring prior to the date of this Release. I also agree to be bound by any further Decree, arising from this cause, entered by the Court with respect to other relief of a non-monetary character, and I agree to discontinue any pending legal action(s) which I may have against ETMF or any predecessor company involving any alleged discrimination based upon race or national origin occurring prior to the date of the execution of this Release.

I have read, had explained, and understand my rights under this Decree. I understand that in executing this Release, I voluntarily agree to be bound by the terms and waivers contained in said Consent Decree.

Signed this —— day of ————, 1974.

————————————

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

(Caption Omitted in Printing)

CIVIL ACTION No. CA-3-6025-B

Stipulations

For the purpose of permitting this Court to consider and enter an Order on the issue of whether the incumbent black and Spanish-surnamed Affected Class applicants and employees are entitled to seniority relief, and solely for such stated purposes, plaintiff United States and defendant East Texas Motor Freight, Inc. (hereinafter referred to as ETMF), hereby agree, stipulate, and represent to the Court that the following facts are true and accurate and may be entered as such by this Court:

1. This action was brought on June 29, 1972, by the Attorney General on behalf of the United States to enforce the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, and the contractual obligations imposed by Executive Order 11246, as amended, 30 F.R. 12319.

2. Defendant ETMF is incorporated under the laws of the State of Texas and does business in this District. ETMF is a common motor freight carrier engaged in the business of transporting commercial freight, including materials for the United States under government bills of lading, and maintains terminal operations in approximately nineteen (19) states.

3. As of September 8, 1972, ETMF employed approximately 3814 persons system-wide, of whom approximately 317 were black and 224 were Spanish-surnamed. As of said date, the distribution of ETMF's work force by race and national origin and by selected job category was as follows:

Job Category	*Total*	*Black*	*Spanish-surnamed*
Clerical	455	2	10
Dock Forman/Line Dispatcher	165	0	0
Salesman	67	0	0
Line Driver	797	7	8
City	1,853	271	186
Janitor	19	10	4
Shop			
Shop Supt./Foreman	37	0	0
Mechanic	169	11	6
Mechanic's Helper	9	2	0
Garageman	70	14	6

4. On June, 1972, the date plaintiff's complaint was filed, ETMF employed no black line drivers. The first black road driver employed by ETMF was a Roseveldt Mayes, in Chicago, Illinois, on July 20, 1972.

5. As of the date the complaint was filed, ETMF employed eight (8) Spanish-surnamed line drivers. Of the eight Spanish-surnamed line drivers, five (5) had been employed as line drivers by Valley Copperstate Systems (VCS) and pursuant to ETMF's acquisition of VCS were employed by ETMF in 1970. The seniority dates of the three remaining Spanish-surnamed line drivers reflect that the most senior was employed by ETMF on May 15, 1971.

6. ETMF currently employs road drivers at the following terminals:

Atlanta, Georgia
Aurora, Illinois
Birmingham, Alabama
Chicago, Illinois
Corning, California
Dallas, Texas
Decatur, Illinois
Detroit, Michigan
Memphis, Tennessee
Moline, Illinois
Neelyville, Missouri
Oakland, California
Pecos, Texas
Phoenix, Arizona
Portland, Oregon
Rockford, Illinois

El Paso, Texas	San Angelo, Texas
Grand Rapids, Michigan	South Bend, Indiana
Jackson, Mississippi	St. Louis, Missouri
Los Angeles, California	Texarkana, Texas
Longview, Texas	Toledo, Ohio

7. All ETMF personnel employed as road drivers, city drivers and dockmen or checkers are represented for the purpose of collective bargaining by local unions affiliated with the International Brotherhood of Teamsters (hereinafter referred to as the Teamsters). ETMF has signed collective bargaining agreements with each such local union of the Teamsters.

8. All ETMF personnel employed as garagemen and mechanics are represented for the purpose of collective bargaining by local unions affiliated with the Teamsters or with the International Association of Machinists and Aerospace Workers (hereinafter referred to as the Machinists). ETMF has signed collective bargaining agreements with each such local of the Teamsters and of the Machinists.

9. Trucking Employers, Inc. is the organization which represents associations of motor carriers, including those to which ETMF belongs, for collective bargaining purposes with the negotiating committees of the Teamsters.

10. Under the current labor agreements that ETMF has with the Teamsters and the Machinists, employees may not carry over their accrued company seniority from city, garage or mechanic positions to road driver positions, or vice-versa.

11. In approximately 1954, ETMF devised and implemented a corporate policy prohibiting employees in city, garage and mechanic classifications from transferring to road driver positions, and vice-versa. This policy, which ETMF commonly refers to as the "no transfer rule," has remained in effect to this date, except that during February 1972, ETMF temporarily suspended the no transfer rule for approximately a thirty (30) day period in order to permit employees classified as city drivers, dockmen or checkers to transfer to road driver positions, or vice-versa, at those company terminals where road drivers were domiciled located within the Southern Conference Area under the National Master Freight Agreement with the Teamsters.

12. In February 1972, or shortly thereafter, if such an employee as referred to in paragraph 11 above was granted permission by the Company to transfer to or from a road driver position, he lost all of his accrued seniority for all purposes except fringe benefits (such as vacation length) and went to the bottom of the seniority list in his new position.

13. Prior to the date of entry of the Cosent Decree in Partial Resolution of this suit, a number of black and Spanish-surnamed applicants and incumbent ETMF employees have sought road driver and other positions unsuccessfully; under the Consent Decree entered herein, these black and Spanish-surnamed applicants and incumbent ETMF employees, as referred to in Paragraph 17 of the Consent Decree, if qualified, will be offered those positions at ETMF.

14. The Affected Class consists of those persons referred to in Paragraph 17 of the Consent Decree entered in Partial Resolution of this suit.

15. ETMF will not introduce evidence herein showing that business necessity requires denying incumbent Affected Class members the right to transfer to road driving or other positions and to carry over their seniority to such positions, for all purposes.

16. The above stipulations are conditioned upon the entry by the Court of the Consent Decree referred to herein.

Respectfully submitted,

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[29 U.S.C. § 158(b)(3)]

(b) It shall be an unfair labor practice for a labor organization of its agents—

• • • • • • • • • •

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

[29 U.S.C. § 159(a)]

Representatives and elections—Exclusive representatives; employees' adjustment of grievances directly with employer

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the em-

ployees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

[42 U.S.C. § 1981]

Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

[Title VII(a) § 703(a)-(j)]

Unlawful employment practices—Employer practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

EMPLOYMENT AGENCY PRACTICES

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

LABOR ORGANIZATION PRACTICES

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail to refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

TRAINING PROGRAMS

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

BUSINESSES OR ENTERPRISES WITH PERSONNEL QUALIFIED ON BASIS OF RELIGION, SEX, OR NATIONAL ORIGIN; EDUCATIONAL INSTITUTIONS WITH PERSONNEL OF PARTICULAR RELIGION

(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

MEMBERS OF COMMUNIST PARTY OR COMMUNIST-ACTION OR COMMUNIST-FRONT ORGANIZATIONS

(f) As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

NATIONAL SECURITY

(g) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

SENIORITY OR MERIT SYSTEM; QUANTITY OR QUALITY OF PRODUCTION; ABILITY TESTS; COMPENSATION BASED ON SEX AND AUTHORIZED BY MINIMUM WAGE PROVISIONS

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of sections 206(d) of Title 29.

BUSINESS OR ENTERPRISES EXTENDING PREFERENTIAL TREATMENT TO INDIANS

(i) Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

PREFERENTIAL TREATMENT NOT TO BE GRANTED ON ACCOUNT OF EXISTING NUMBER OR PERCENTAGE IMBALANCE

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any

individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area. Pub.L. 88-352, Title VII, § 703, July 2, 1964, 78 Stat. 255; Pub.L. 92-261, § 8(a), (b), Mar. 24, 1972, 86 Stat. 109.

Supreme Court, U. S.
FILED
DEC 13 1975
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Nos. 75-651, 75-715, and 75-720

IN THE

Supreme Court of The United States

OCTOBER TERM, 1975

TEAMSTERS LOCAL UNION 657, *Petitioner*
vs
ERNEST HERRERA, TRINI URIBE, and MARIO MELCHOR, *Respondents*
and
TEAMSTER LOCAL UNION 657, *Petitioner*
vs
PATRICK RESENDIS, TONY RESENDIS, WILBURN WHITE, ARTURO RODRIGUEZ, and ELIAS RODRIGUEZ, *Respondents*

SOUTHERN CONFERENCE OF TEAMSTERS, *Petitioner*
vs
ERNEST HERRERA, TRINI URIBE and MARIO MELCHOR, *Respondent*
and
SOUTHERN CONFERENCE OF TEAMSTERS, *Petitioner*
vs
PATRICK RESENDIS, TONY ESCOBEDO, WILBURN WHITE, ARTURO RODRIGUEZ and ELIAS GONZALEZ

LEE WAY MOTOR FREIGHT INC., *Petitioner*
vs
PATRICK RESENDIS, TONY ESCOBEDO, WILBURN WHITE, ARTURO RODRIGUEZ, and ELIAS GONZALEZ
and
YELLOW FREIGHT SYSTEM INC., *Petitioner*
vs
ERNEST HERRERA, TRINI URIBE and MARIO MELCHOR

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

Memorandum For Respondents' Herrera, Uribe, Melchor, Resendis, Escobedo, and Gonzalez In Opposition To The Petitions For Writ of Certiorari

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INDEX

Page

NATURE OF THE CASE ____ 2

REASONS FOR DENYING WRITS ____ 3

CONCLUSION ____ 8

CERTIFICATE OF SERVICE ____ 9

CASES CITED

Pages

Alabama vs. The United States,
304 F. 2d 583, 586 (5th Cir. 1962); 371 U.S. 37 (1962) 4

Bing vs. Roadway Express Inc.,
444 F. 2d 686 (5th Cir. 1971) 3, 4, 6

Bing vs. Roadway Express Inc.,
485 F. 2d 441 (5th Cir. 1973) 7

Carey vs. Greyhound Bus Co.,
500 F. 2d 1372 (5th Cir. 1974) 6

Herrera vs. Yellow Freight System Inc.,
505 F. 2d 66 (5th Cir. 1974) 2

Jones vs. Lee Way Motor Freight Inc.,
431 F. 2d 245, (10th Cir. 1970) cert den 401 U.S. 954 ..... 3, 4

McDonnell Douglas Corp. vs. Green,
411 U.S. 792 (1973) 3, 4, 5

Robinson vs. Lorillard
444 F. 2d 798 8

Rodriguez vs. East Texas Motor Freight,
505 F. 2d 40 (5th Cir. 1974) 2

Thornton vs. East Texas Motor Freight,
497 F. 2d 416, (6th Cir. 1973) 2, 5, 7

United States vs. Central Motor Lines Inc.,
(W. D. NC 1971) 338 F. Supp 798 7

United States vs. St. Louis - San Francisco Railway Co.,
464 F. 2d 301 8

STATUTES CITED

42 U.S.C. § 2000 e2 2

42 U.S.C. § 1981 2

IN THE

Supreme Court of The United States

OCTOBER TERM, 1975

No. 75-651

TEAMSTERS LOCAL UNION 657, *Petitioner*
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No. 75-715

SOUTHERN CONFERENCE OF TEAMSTERS, *Petitioner*
vs
ERNEST HERRERA, TRINI URIBE and MARIO MELCHOR, *Respondent*
and
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vs
PATRICK RESENDIS, TONY ESCOBEDO, WILBURN WHITE, ARTURO RODRIGUEZ and ELIAS GONZALEZ

No. 75-720

LEE WAY MOTOR FREIGHT INC., *Petitioner*
vs
PATRICK RESENDIS, TONY ESCOBEDO, WILBURN WHITE, ARTURO RODRIGUEZ, and ELIAS GONZALEZ
and
YELLOW FREIGHT SYSTEM INC., Petitioner
vs
ERNEST HERRERA, TRINI URIBE and MARIO MELCHOR

Motion On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The

Memorandum For The Respondents In Opposition To The Petitions For Writs Of Certiorari Fifth Circuit

NATURE OF THE CASES

Respondents, Ernest Herrera, Trini Uribe, and Mario Melchor sued Petitioners, Yellow Freight System Inc., Local 657 of The Teamsters Union, The Southern Conference of Teamsters and The International Brotherhood of Teamsters claiming a violation of Title 42 U.S.C. 2000 e-2 and Title 42 U.S.C. 1981.

The District Court found no discrimination and The Fifth Circuit Court of Appeals reversed and remanded as to everyone except the International Brotherhood of Teamsters, 505 F. 2d 66.

Respondents, Patrick Resendis, Tony Escobedo, Elias Gonzalez sued Lee Way Motor Freight Inc., and the union organizations for violation of 42 U.S.C. 2000 e-2 and Title 42 U.S.C. 1981. The District Court denied relief and the Fifth Circuit reversed and remanded as to all parties except the International Brotherhood of Teamsters, 505 F. 2d 69.

REASONS FOR DENYING WRITS

Your Respondents were all employed as city drivers by Yellow Freight System Inc., and Lee Way Motor Freight Inc. All Respondents are of Mexican-American descent, surname and members of Local 657 of the Teamsters Union.

Their claim is that the no-transfer policy of their employers and the maintenance of separate senority rosters by virtue of the negotiations by the Southern Conference of Teamsters as agent for Local 657 of the Teamsters resulted in a discriminatory "lock in" to lower paying positions as city drivers and prevented Respondents from bettering themselves by obtaining jobs as road drivers.

The actions filed against the employers and unions are not class actions but were brought on behalf of the individual Respondents.

All three Petitions for Certiorari herein take the position that the United States Court of Appeals opinions herein are in conflict with the holding of this Honorable Court in **McDonnell Douglas Corp. vs. Green** 411 U.S. 792 (1973) and the holding of the Sixth Circuit Court of Appeals in **Thornton vs. East Texas Motor Freight,** 497 F. 2d 416 (6th Cir. 1973).

Respondents maintain that the basis of their suit rests upon the rule as announced in **Jones vs. Lee Way Motor Freight Inc.,** 431 F. 2d 245, (10th Cir 1970) cert den 401 U.S. 954 and **Bing vs. Roadway Express Inc.,** 444 F. 2d 686 (5th Cir. 1971).

The evidence of the "lock in" must necessarily depend on the statistical balance or imbalance exist-

ing in the job position in question. The statistical approach to this problem was approved by this Court in **Alabama vs. The United States,** 304 F. 2d 583, 586 (5th Cir. 1962); 371 U.S. 37 (1962).

Petitioners argue that **McDonnell Douglas** (supra) requires that the individuals have the burden of proving an application for a road driving job and that they were qualified to hold same.

The Petitioner's argument totally ignores the footnote 13 of this opinion at 411 U.S. 802, which says "The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations."

The Fifth Circuit opinion points out that in **McDonnell Douglas** (supra) there was no past history of employment discrimination. The situation in Respondents' cases being different in that under the holding of **Jones vs. Lee Way** (supra) and **Bing vs. Roadway** (supra), there was a history of past discrimination.

It must also be pointed out that all Respondents were city drivers for their respective companies. The statistics in the Lee Way case shows that Lee Way has only had one Mexican-American road driver domiciled at their San Antonio, Terminal. This one individual was Arturo Rodriguez, one of the original complaintants. The statistics show that Twenty-five of the city drivers employed by Lee Way were Mexican-American. The contrast in the percentage of Mexican-American and Anglo line drivers drama-

tically shows the history of past discrimination.

The statistics in the Yellow Freight case show that of ninety-six line drivers employed at the time of commencement of this suit no Mexican-American road drivers were employed by Yellow Freight at either of its Two Texas Terminals.

It must be remembered that at the trial level the District Court found no discrimination concerning any of the complaints made by Respondents. The Fifth Circuit held that the discrimination which the statistics showed constituted past discrimination in the hiring of road drivers. The discrimination was continued by the no-transfer policy of both companies which refused to permit minority city drivers to carry over their competitive status senority to road driving jobs.

Petitioners overlook the fact that the Fifth Circuit did not hold in favor of the Appellants Rodriguez, and White. It is obvious that the Fifth Circuit applied the **McDonnell Douglas** (supra), standards. The real discrimination in the eyes of the Fifth Circuit was the history of hiring discrimination and the denial of opportunity to show that they were qualified for road driving jobs.

The Petitioner Unions take the position that the holding of the Fifth Circuit is in conflict with the Sixth Circuit holding in **Thornton vs. East Texas Motor Freight,** 497 F. 2d 416 (6th Cir 1974). The Court in **Thornton** (supra) was faced with a totally different situation. The primary question was what remedy the complaintants should be granted concerning the Local Union. The bargaining party, the

Southern Conference of Teamsters had been dismissed by the District Court. The important difference in the instant cases is that the remedy question was never considered by the District Court because of the findings of no discrimination.

It is, therefore contended that the real discrimination that the Petitioner Unions participated in was the maintenance of the separate contracts for city and road drivers.

Respondents contend that the real question is whether or not the Petitioner unions acquiesed in a racially discriminatory senority system as was the case in **Carey vs. Greyhound Bus Co.** 500 F. 2d 1372 (5th Cir 1974). The Fifth Circuit in the last cited case took the position that when a senority system locks black employees into low paying jobs, the employer and a predominantly white union can be held liable for back pay for maintaining the discriminatory system and a predominantly black union can also be held liable for back pay for acquiesing in the system.

The **Bing** (supra) and **Jones** (supra) cases hold the no-transfer rule to be discriminatory and in violation of the Civil Rights Act of 1964. The National Master Freight Agreement is negotiated on a national level. The National Master Freight Agreement covers both city drivers and road drivers. The supplemental agreements are negotiated on an area wide basis by the local representatives of unionized trucking companies in that area. In the instant cases the supplemental agreements were negotiated by the Southern Conference of Teamsters and administered by Local

Union 657. Local 657 represents all Respondents in the instant cases. While the local union had nothing to do with hiring, the local was certainly aware that the surrender of senority required to take a road driving job would discourage and prevent the minority members of the local from transfering to the road. Put another way, the maintenance of separate senority rosters for city and road drivers is the same thing as the employer's no-transfer policy because both require the surrender of senority at the time of transfer. Thus, the unions have joined hands with the employers to further the past discriminatory practices of the employer.

Local 657 contends that they have no road drivers in their jurisdiction. This is not so. Arturo Rodriguez was a road driver for Lee Way and since this litigation has commenced Petitioner, Patrick Resendis, has been on the road.

Local 657 relies on the fact that their members defeated a proposal to merge city and road drivers contracts. This they contend expresses the will of a majority of drivers for the separate contracts. Respondents contend that the Petitioner unions should have taken some kind of action to allow qualified minority city drivers to transfer to road driving jobs on a one-time only basis with senority carry-over. See **Thornton vs. East Texas Motor Freight** (supra), **Bing vs. Roadway Express Inc.**, 485 F. 2d 441; **United States vs. Central Motor Lines, Inc.**, (W.D. NC 1971) 338 F. Supp 798.

The existence of the above mentioned reasonable course of action destroys the business necessity argu-

ment of the Union Petitioner. **United States vs. St. Louis - San Francisco Railway Co.**, 464 F. 2d 301 at 308; **Robinson vs. Lorillard,** 444 F. 2d at 798.

The Petitioner Union Organizations and management take the position that the Respondents did not make applications for road driving jobs. Respondents contend that an application made by any of them would, in view of the hiring policies in effect at the time of the filing of these suits any application would have been futile. They all had been denied the opportunity to show their qualifications because they had been denied the opportunity to take a road driving test and prove their qualifications, **Witherspoon vs. Mercury Van Lines Inc.**, 457 F. 2d 496, (5th Cir 1972).

In the Yellow Freight System Inc., case there is evidence that Respondent Trini Uribe had his superior write a letter to the man in charge of hiring road drivers at the Baxter Springs Kansas terminal. This application was ignored by the employer.

CONCLUSION

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with the rules of this court, true copies of the foregoing have been served upon the following counsel of record by placing same in the United States Mail postage prepaid on this 11th day of December, 1975.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-651

TEAMSTERS LOCAL UNION 657,
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Respondents.

No. 75-715

SOUTHERN CONFERENCE OF TEAMSTERS,
Petitioners,
vs.
JESSE RODRIGUEZ, et al.,
Respondents.

No. 75-718

EAST TEXAS MOTOR FREIGHT SYSTEM, INC.,
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INDEX

Page

Table of Authorities ii
Opinions Below 2
Jursidiction 2
Questions Presented 2
Statement of the Case 3
Statement of the Facts 9
Reasons for Denying the Writs 13

I. THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT THIS WAS AN APPROPRIATE CLASS ACTION 13

II. THERE IS NO CONFLICT BETWEEN THE FIFTH AND SIXTH CIRCUITS 17

III. THE COURT OF APPEALS USED THE CORRECT LEGAL STANDARD IN HOLDING THAT PLAINTIFFS HAD MADE OUT A PRIMA FACIE CASE OF UNFAIR DISCRIMINAITION 19

IV. THERE IS NO CONFLICT BETWEEN THE CIVIL RIGHTS ACT OF 1964 AND THE NATIONAL LABOR RELATIONS ACT 23

Conclusion 27

TABLE OF AUTHORITIES

Cases

	Page
Bing v. Roadway Express, Inc., 444 F.2d 687 (5th Cir. 1971)	14,20
Bing v. Roadway Express, Inc., 485 F.2d 441 (5th Cir. 1973)	14,15, 26
Franks v. Bowman Transportation Co., 495 F.2d 398 (5th Cir. 1974)	15
Humphrey v. Moore, 375 U.S. 335 (1964).	24
Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968)	13
Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970), cert denied, 401 U.S. 954 (1971)	20
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	21
National Labor Relations Board v. Borg-Warner Corp., 356 U.S. 342 (1958)..	24
National Labor Relations Board v. International Brotherhood of Electrical Workers, 266 F.2d 349 (5th Cir. 1969)...	23
Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968)	13,15

Page

Parkham v. Southwestern Tel. Co., 433 F.2d 421 (8th Cir. 1970) 13,20

Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971) 26

Rodriguez v. East Texas Motor Freight, 505 F.2d 40 (5th Cir. 1974) ..... passim

Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972) 20

Sabala v. Western Gilette, Inc., 362 F. Supp. 1142 (S.D. Tex. 1973) 16

Thornton v. East Texas Motor Freight, 497 F.2d 416 (6th Cir. 1974) ..... passim

United States v. Central Motor Lines, Inc., 338 F. Supp. 532 (W.D. N.C. 1971) 26

United States v. Chesapeake & Ohio Ry. Co., 471 F.2d 582 (4th Cir. 1972)... 26

United States v. Hayes International Corp., 456 F.2d 112 (5th Cir. 1972) 19,20

United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971) 20

United States v. St.Louis-San Francisco Ry. Co., 464 F.2d 301 (8th Cir. 1972) .. 26

Statutes

Page

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq. ..... passim

Federal Rules of Civil Procedure, Rule 23 13,14,15

42 U.S.C. §1981 ..... passim

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-651

TEAMSTERS LOCAL UNION 657,

vs. Petitioner,

JESSE RODRIGUEZ, et al.,

Respondents.

No. 75-715

SOUTHERN CONFERENCE OF TEAMSTERS,

Petitioners.,

vs.

JESSE RODRIGUEZ, et al.,

Respondents.

No. 75-718

EAST TEXAS MOTOR FREIGHT SYSTEM, INC.,

vs. Petitioner,

JESSE RODRIGUEZ, et al.,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION
TO PETITIONS FOR WRITS OF CERTIORARI

OPINIONS BELOW

The Findings of Fact and Conclusions of Law of the United States District Court for the Western District of Texas, San Antonio Division (App. "A" of Southern Conference of Teamsters' Petition for Writ) are reported at 6 EPD ¶ 8815. The opinion of the Court of Appeals for the Fifth Circuit (App. "B" of Southern Conference of Teamsters' Petition for Writ) is reported at 505 F.2d 40.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Southern Conference of Teamsters' Petition for Writ.

QUESTIONS PRESENTED

1. Was the Court of Appeals correct in ruling that this case was an appropriate class action?

2. Did the Court of Appeals, in a class action under Title VII of the Civil Rights Act of 1964, apply the correct legal standard?

3. Is there a substantial conflict between the Fifth Circuit Court of Appeals and

the Sixth Circuit Court of Appeals?

STATEMENT OF THE CASE

Respondents,[1] who were plaintiffs below, are Mexican American "city drivers" for the East Texas Motor Freight System,[2] residents of San Antonio, Bexar County, Texas. Petitioners, who were the defendants below, are the ETMF, a corporation doing business in the state of Texas and city of San Antonio, which operates and maintains a local, city-wide freight terminal and city-wide trucking service in San Antonio, Bexas County, Texas, and an employer within the meaning of 42 U.S.C. §2000e-(b); the Teamsters Local Union 657, and the Southern Conference of Teamsters, which are the representatives

---

1. Jesse Rodriguez, Sadrach G. Perez and Modesto Herrera, on their own behalf and on behalf of those similarly situatied.

2. Hereinafter "ETMF".

and bargaining agents of the plaintiff employees on a regional and local basis. The plaintiffs brought an employment discrimination class action, on behalf of all Mexican American and black "city drivers" of the ETMF included in the collective bargaining agreement entered into between ETMF and the Southern Conference of Teamsters covering the state of Texas, challenging two ubiquitous practices in the trucking industry: (1) the trucking companies' requirement that "city drivers" resign from their "city driver" jobs before applying for the more lucrative and sought-after "road driver" positions, and (2) the companies' rule preventing city drivers from carrying their seniority over to road driver jobs. Plaintiffs contended that these facially neutral practices of ETMF and the defendant union organizations perpetuate the effects of past discriminatory practices, as to the road driver positions, and thus violate Title VII of the Civil Rights Act of 1964, and 42 U.S.C. §1981.

Prior to trial, the parties stipulated that before 1970 ETMF had never employed a black or Mexican American as a road driver in

the Texas Southern Conference area. ETMF's road driver force, in that area, numbered approximately 180, all white/Anglo drivers. After charges were filed by respondent, Jesse Rodriguez, with the Equal Employment Opportunity Commission on August 20, 1970, the company hired three Mexican American road drivers in El Paso. By the time of trial, the company had still not hired a single black road driver in Texas.

Parties also stipulated that, although plaintiffs had filed written applications for employment as road drivers with the Terminal Manager in 1970, ETMF never considered the written applications and that these applications were transmitted to the Dallas corporate office of ETMF only after the filing of the Equal Employment Opportunity Commission charges.

Prior to trial, the parties stipulated, in addition to the above stipulations, that the charge of discrimination was based upon the fact that after their original employment, plaintiffs have been "locked-in" to the lower-paying job of city driver and denied jobs as road drivers by the operation of the industry-

wide practices of:

(a) requiring city drivers to resign their city driver jobs before applying for the more lucrative and sought-after road driver positions, and;

(b) preventing city drivers from carrying their seniority over to road driver jobs.

Plaintiffs further argued and indeed defendants stipulated that:

(a) ETMF had discouraged inquiries from plaintiffs concerning the qualifications and/or availability of road driver jobs;

(b) ETMF had always employed Anglo/white applicants as road drivers;

(c) ETMF's policy and practices of recruiting road drivers has been based on a word-of-mouth system. Since the company's road drivers and supervisory terminal personnel are almost exclusively Anglo/white, such a practice has continued the illegal exclusion of Mexican Americans and Negroes as road drivers.

Despite the evidence adduced by the plaintiffs, and the stipulations recited

above, the District Court for the Western District of Texas held that the defendants did not violate 42 U.S.C. §2000e-5, nor any section of Title 42 relating to race discrimination. Rodriguez v. East Texas Motor Freight, No. SA-71-CA-302 (W.D. Tex., March 22, 1973), Petitioner Teamsters Local Union 657's Appendix to Petition for Writ at p. A-1 through A-12. The court concluded that the cause of action was not a proper cause of action and dismissed the class action claims in the complaint and denied all relief to plaintiffs. Local 657's Appendix at p. A-12.

Plaintiffs appealed, and on November 25, 1974, the Fifth Circuit Court of Appeals, Wisdom, Circuit Judge, reversed and held that plaintiffs met class action requirements and could maintain an action on behalf of all the carrier's Mexican American and Negro city drivers who were included in the collective bargaining agreement; that there was evidence that discrimination had been practiced in the past in hiring of road drivers; that the "no transfer" policy and maintenance of separate seniority rosters for city and road drivers perpetuated the past discrimination and that

the fact that there was no business necessity precluding the hiring of city drivers for road driver positions established that the carrier had discriminated against plaintiffs and the plaintiffs' class. The Fifth Circuit further held that participation by union organizations in the establishment of separate seniority rosters constituted a violation of the civil rights statutes. The Court of Appeals reversed with instructions for the District Court to consider the issue of remedy, and provided the boundaries within which the decree must be drawn.[3/]

3. The Court of Appeals, on remand, ordered the District Court to monitor carefully the criteria used by ETMF to prevent minority city drivers from transfering to road driver jobs. Rodriguez v. East Texas Motor Freight, 505 F.2d 40, 61 (5th Cir. 1974).

STATEMENT OF THE FACTS

ETMF is an interstate common carrier by motor truck of general freight. The ETMF system conducts its business by carrying loads of merchandise between cities within the ETMF system in ten-speed tractors with semi-trailers driven by "road drivers". Freight is collected from customers and delivered to ETMF terminals and picked up from terminals and delivered to customers in smaller, compact equipment driven by "city drivers". In the trucking industry, "road driver" is considered a separate job classification from "city driver". Road drivers have the most prestigious driving job in the trucking industry, and they usually bring home the highest pay.

City drivers and road drivers are covered by different collective bargaining agreements. The petitioner Teamsters Local Union 657, has a collective bargaining agreement with ETMF which covers city drivers at ETMF's terminal in San Antonio. Petitioner Southern Conference of Teamsters, a delegate body of the International Brotherhood of Teamsters, is

made up of representatives from the affiliated locals in ten southern states.

Since 1954 ETMF has followed a "no transfer" policy, prohibiting the transfer of drivers between city and road driver classifications and between terminals. Under the policy, in order for a city driver to obtain a position as a road driver, he must resign his city driver job and apply for a road driver slot. He thereby forfeits all accumulated seniority. In effect, he stands on no better footing in applying for a road driver job than a complete stranger to the company. And if his bid to be a road driver fails, there is no guarantee that he will be rehired as a city driver. ETMF's "no transfer" policy is complemented by the fact that under collective bargaining contracts between ETMF and petitioner Local 657, city drivers who transfer to road positions do not carry over their "competitive status" seniority, that is, seniority for job bidding and lay-off purposes.

For thirty days in 1972, ETMF relaxed its no-transfer policy and allowed city drivers to transfer, if they could qualify.

This temporary modification did not, however affect the dual seniority system established by the separate collective bargaining agreements. Any city driver transferring to the road, under the modified policy, still lost his seniority for job bidding purposes. Moreover, the one-time-only change in policy opened the possibility of transfer only to those city drivers who worked at terminals domiciling road drivers; the restrictions on interterminal transfers remained in effect.

The parties stipulated that before 1970 East Texas Motor Frieght had never employed a black or Mexican American as a road driver in the Texas Southern Conference area. Only after charges were filed by plaintiff, Jesse Rodriguez, with the Equal Employment Opportunity Commission, did the company hire three Mexican American road drivers in El Paso. By the time of the trial, the company had still not hired a single black road driver in Texas. With the exception of one temporary road driver, ETMF has never domiciled any road driver in San Antonio. Therefore, the named respondents and other San Antonio city drivers were not able to take advantage of the temporary modification

of the "no transfer" policy in the winter of 1972.

In 1970, the named plaintiffs applied for road driver jobs. ETMF has stipulated that it never considered these applications for employment as road drivers. Respondent Rodriguez filed a written charge with the Equal Employment Opportunity Commission on August 20, 1970, alleging that the policies of ETMF, Local 657, and the Southern Conference of Teamsters relegated Mexican Americans and blacks to city driver jobs. Respondent Herrera filed similar charges on March 11, 1971, and respondent Perez on June 7, 1971. Respondents filed their class action on October 26, 1971 in the United States District Court for the Western District of Texas, against ETMF, the Southern Conference of Teamsters, and Teamsters Local Union 657, alleging national origin and racial discrimination in violation of the Civil Rights Act of 1866, 42 U.S.C. §1981, and Title VII of the Civil Rights Act of 1964. Plaintiffs' cause of action under Title VII was authorized by §706(f)(1) of the Act, 42 U.S.C. §2000e-5, which expressly permits such private actions, under certain specified conditions not at issue here.

REASONS FOR DENYING THE WRITS

I. THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT THIS WAS AN APPROPRIATE CLASS ACTION.

Petitioners argue that the Court of Appeals, in disregard of Rule 23, Federal Rules of Civil Procedure, incorrectly held that this was a class action. The Court of Appeals correctly rejected that argument and held that the requirements of Rule 23(a) must be read liberally in the context of suits brought under Title VII and §1981. Suits brought under these provisions are inherently class suits. By definition, discrimination on the basis of race or national origin is a class wrong, Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir. 1968); and a suit charging employment discrimination is naturally "a sort of class action for fellow employees similarly situated." Jenkins v. United Gas Corp., 400 F.2d 28, 33 (5th Cir. 1968); see also, Parham v. Southwestern Tel. Co., 433 F.2d 421, 428 (8th Cir. 1970). When class relief is sought in the complaint, the court should apply liberally the requirements of Rule 23(a). See, Bing v. Roadway Express, Inc., 485 F.2d 411, 446

(5th Cir. 1973).

The Court of Appeals correctly held that there was no serious dispute that plaintiffs had satisfied the first three criteria of Rule 23(a). The class clearly meets the requirements that the members be so numerous that joinder would be impractical, that there are common questions of law and fact, and that the claims and defenses of the representative parties are typical. Defendants challenged only the fourth requirement, that the named parties "fully and adequately protect the interests of the class." The petitioner's challenge is on the wholly untenable ground that some minority employees had opposed seniority merger at the union meeting. The company's altruistic concern is commendable. However, not only is no information provided as to such important factors as the nature of, attendance at, or circumstances surrounding the "vote", but, more importantly, the Court of Appeals in Bing v. Roadway Express, Inc., 444 F.2d 687, 691, (5th Cir. 1971), flatly rejected any suggestion that employee preference "should be accorded greater weight than plaintiffs' rights under Title VII." Furthermore,

the "interests" to be represented by Rule 23 class representatives are the legal interests of that class, rather than the personal preferences of some individual members of that class.

The Court of Appeals correctly found that:

> Even taking the results of the vote at face value, we reject the district court's conclusion that there was sufficient reason to dismiss the class action in this case. Especially in light of the fact that the evidence of the union vote was not received until two weeks after the trial, there were two preferable options open to the trial judge. First, he could have shaped the class to remove any possible antagonism between the representatives and some of the city drivers. The court could have narrowed the class or separated it into subclasses for purposes of relief. See Oatis v. Crown Zellerbach Corp., 398 F.2d at 499. Or, the court could have shaped the relief to avoid any injustice to the dissenting class members. District courts have wide discretion in fashioning relief under Title VII, Franks v. Bowman Transportation Co., 5 Cir. 1974, 495 F. 2d 398, 414; Bing v. Roadway

> Express, Inc., 485 F.2d at 448-449. And flexibility and careful tailoring of judicial decrees in Title VII cases are the order of the day. See, e.g., Sabala v. Western Gillette, Inc., S.D. Tex. 1973, 362 F. Supp. 1142. The disagreement here concerned only the proper remedy; there was no antagonism with regard to the contention that the defendants practiced discrimination against the plaintiff class. We do not believe that disagreement within the class as to remedy desired, surfacing so late in the litigation, should have resulted in a dismissal of the class action.

Rodriguez v. East Texas Motor Freight, 505 F.2d 40, 51 (5th Cir. 1974).

The Court of Appeals, relying upon the evidence introduced at trial by the plaintiffs and the stipulations entered into by the parties, correctly found that Rule 23(a) had been met and that the action was an appropriate class action.

II. THERE IS NO CONFLICT BETWEEN THE FIFTH AND SIXTH CIRCUITS.

Petitioners incorrectly argue that the decisions of the Fifth and Sixth Circuits are in substantial conflict. Petitioners have failed to meet their burden of showing a conflict between the Circuits. Petitioners argue that the local union in Thornton v. East Texas Motor Freight, 497 F.2d 416 (6th Cir. 1974) was held not liable, while in Rodriguez the local union, along with the regional union and the employer, were held liable. We submit that there is no substantial conflict. In Thornton, the Court of Appeals held the local union not liable because of a lack of substantial evidence that the local union had "acquiesced" in the company's "no transfer" rule. In the instant case, in contrast, it is the creation and maintenance of separate seniority rosters for road and city drivers, without provision for seniority carryover by minority city drivers in the collective bargaining agreement, that forms the crux of the complaint against the union defendants. The Court of Appeals correctly held that for their role in

continuing the effects of this discrimination the union defendants must share the blame and the liability.

Another distinguishing factor is that the Court of Appeals in Thornton was convinced that the plaintiffs there really only wanted to file charges against the company and not against the union. 497 F.2d at 426. In contrast, the plaintiffs in the instant case have always maintained that the defendant unions are equally liable.

On these facts, the decision of the Court of Appeals in the Fifth Circuit was correct and not in conflict with the Sixth Circuit.

III. THE COURT OF APPEALS USED THE CORRECT LEGAL STANDARD IN HOLDING THAT PLAINTIFFS HAD MADE OUT A PRIMA FACIE CASE OF UNFAIR DISCRIMINATION.

Petitioners argue that the Court of Appeals erred in holding that plaintiffs in a class action under Title VII of the Civil Rights Act need only a statistical imbalance to establish a prima facie case of racial discrimination.

The Court of Appeals correctly held that a prima facie case of discrimination may be established by statistical evidence. The Court of Appeals relied on United States v. Hayes International Corp., 456 F.2d 112, 120 (5th Cir. 1972), which held that the inference of discrimination arises from the statistics themselves and no other evidence is required to support the inference. It is now commonly accepted that a Title VII plaintiff can establish a prima facie showing of unlawful discrimination by the introduction of statistical

data.[4/] Once such a showing is made the burden of proof shifts to the defendant. Bing v. Roadway Express, Inc., 444 F.2d 687, 689 (5th Cir. 1971). Rowe v. General Motors Corp., 457 F.2d 348, 358 (5th Cir. 1972) holds that once the plaintiff establishes a prima facie case, the burden shifts to the defendant to rebut the statistics or to explain the disparity in hiring. In the instant case, the statistics are overpowering. Defendant ETMF stipulated to these statistics prior to trial. These figures clearly establish a prima facie case of past discrimination.

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4. See, Bing v. Roadway Express, Inc., 444 F.2d 687 (5th Cir. 1971); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970), cert. denied, 401 U.S. 954 (1971); Parham v. Southwestern Tel. Co., 433 F.2d 421 (8th Cir. 1970); Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972); United States v. Hayes International Corp., 415 F.2d 1038 (5th Cir. 1969); United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971).

The Court of Appeals correctly applied the legal standard of showing a prima facie case by statistical evidence.

Petitioners incorrectly argue that the Court of Appeals' decision is in conflict with this Court's decision in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The Court of Appeals correctly held that nothing in McDonnell Douglas is inconsistent with the accepted practice of federal courts recognizing statistics as establishing a prima facie case of employment discrimination.

McDonnell Douglas was concerned with the order and allocation of proof in a private, non-class action challenging employment discrimination. 411 U.S. at 800. Furthermore, the Court observed in a crucial footnote that the test outlined in the opinion for a prima facie case "is not necessarily applicable in every respect to differing factual situations." 411 U.S. at 802, n. 13. The Court of Appeals was clearly correct in its finding that the present case differs in several significant respects from McDonnell Douglas. First, this is a class action. Equally important, in

McDonnell Douglas there was no history of past discrimination or any other factor that might have discouraged plaintiff from applying for a job. In contrast, in Rodriguez, there was a past history of employment discrimination. There is another distinction of importance in McDonnell Douglas, the fact that respondent's qualifications were undisputed. In the instant case, in contrast, the possibility of meeting one of the most important criteria for hiring, the road test, has been denied to the class of city drivers. Deprived of this opportunity, plaintiffs could not prove they were qualified to become road drivers.

The Court of Appeals correctly applied the legal standard in the establishment of a prima facie case of employment discrimination.

IV. THERE IS NO CONFLICT BETWEEN THE CIVIL RIGHTS ACT OF 1964 AND THE NATIONAL LABOR RELATIONS ACT.

Petitioner Local 657 correctly argues that it could not, acting alone, have effected any relief for plaintiff's class. But it was the integrated action, or inaction, of the local union and petitioner Southern Conference of Teamsters which led the Fifth Circuit to impose liability. The local union and the Southern Conference are not separate entities. The Southern conference negotiated the discriminatory supplemental agreement. Local 657 signed that discriminatory agreement, and actively administered its discrimination at the terminal level.

> For their role in establishing separate seniority rosters that failed to make allowance for minority city drivers who had been discriminatorily relegated to city driver jobs, Local 657 and the Southern Conference must be held accountable.

Rodriguez, supra, 505 F.2d at 61. Such intimate identity was not present in National Labor Relations Board v. International Brotherhood of Electrical Workers, 266 F.2d 349 (5th

Cir. 1959), which involved an attempted jurisdictional usurpation by the Electrical Workers of jobs held by the United Steelworkers, an altogether different union.

Correctly viewed, this case presents no conflict with National Labor Relations Board v. Borg-Warner Corp., 356 U.S. 342 (1958), since petitioner's liability does not depend upon categories of bargaining subjects, but upon its failure to take any action to eliminate, and its acquiesence in, the discriminatory effects of arbitrary restrictions.

The union's "obligation 'to represent all members of an appropriate unit requires [it] to make an honest effort to serve the interests of all those members, without hostility to any . . .' and its powers are 'subject always to complete good faith and honesty of purpose in the exercise of its discretion' [citation omitted]." Humphrey v. Moore, 375 U.S. 335, 342 (1964).

The Fifth Circuit Court of Appeals found that:

> The plaintiffs' prima facie case of hiring discrimination,

> and proof that the seniority system, a creature of the collective bargaining agreement, transmitted the discrimination into the present, shifted the burden to the defendant unions to show that the present discriminatory effects were unavoidable, that is, required as a business necessity.
>
> The primary justification offered by the union defendants is that in contributing to the establishment of separate seniority rosters they were merely following the desires of the majority of their black and Mexican-American members. Once again the defendants rely on the post-trial defeat by members of Local 657 of a proposal to merge city and road driver contracts as an indication of the preferences of a majority of Mexican-American and black city drivers. As we mentioned earlier, the degree to which the vote should be taken to represent the true desires of members of the plaintiff class is uncertain. In any event, the unions perceive their responsibility too narrowly. There are established ways to eliminate the lock-in effect of separate seniority rosters without merging rosters and jeopardizing the seniority

rights of those city drivers who remain in their positions. Most obviously, seniority carryover can be allowed on a one-time-only basis for qualified minority city drivers who wish to transfer to the road. See, e.g., Thornton v. East Texas Motor Freight, supra; Bing v. Roadway Express, Inc., 485 F.2d 441; United States v. Central Motor Lines, Inc., W.D.N.C. 1971, 338 F. Supp. 532. No reciprocal arrangement for road drivers would have to be necessary, because they have suffered no discrimination. See United States v. Chesapeake & Ohio Ry. Co., 4 Cir. 1972, 471 F.2d 582, 593. We believe a one-time-only transfer with seniority carryover was an alternative that could have eased the discriminatory effects of the separate seniority lists without injury to any minority city driver. This reasonable alternative vitiates the business necessity defense. See United States v. St. Louis-San Francisco Railway Co., 464 F.2d 301 at 308; Robinson v. Lorillard Corp., 444 F.2d at 798.

For their role in establishing separate seniority rosters that failed to make allowance for minority city

drivers who had been discriminatorily relegated to city driver jobs, Local 657 and The Southern Conference must be held accountable. They have violated 42 U.S.C. § 2000e-2 and 42 U.S.C. § 1981. The district court's finding to the contrary is clearly erroneous.

Rodriguez, supra, at 61.

The issues in the present case are sufficiently narrow, and no amount of strained semantics can convert it into one warranting review by this Court on certiorari.

CONCLUSION

For the reasons stated above, respondents submit that the Petitions for Writs of Certiorari in the instant case should be denied.

Respectfully submitted,

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Supreme Court, U. S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-651

TEAMSTERS LOCAL UNION 657,
Petitioner,
vs.
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On Their Own Behalf and on Behalf of Those Similarly Situated,
Respondents,
and
TEAMSTERS LOCAL UNION 657,
Petitioner,
vs.
ERNEST HERRERA, TRINE URIBE and MARIO MELCHOR,
Respondents,
and
TEAMSTERS LOCAL UNION 657,
Petitioner,
vs.
PATRICK RESENDIS, TONY ESCOBEDO, WILBURN WHITE,
ARTURO RODRIGUEZ and ELIAS GONZALEZ,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Fifth Circuit

BRIEF FOR THE PETITIONER
Teamsters Local Union 657

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Questions Presented	2
Statement of the Case	3
A. The Nature of the Cases and Parties Involved	3
B. The Trial Court Stipulation in Rodriguez	5
C. Statistical Evidence, Applications and Responsibility for Hiring	6
D. Jurisdiction and Membership of Local 657	8
E. The Contracts in Issue and the Negotiation Thereof	8
F. Decisions of the Courts Below	12
Summary of Argument	13
Argument	14
I. The National Labor Relations Act bars Local 657 from singularly effecting changes in national and regional collective bargaining agreements approved by a majority of the multi-union bargaining unit. Since Local 657 has not committed any other act of commission or omission in violation of law, it should not be held to have violated the Civil Rights Act of 1964 or 42 U.S.C. Section 1981 solely because it did not effect some type of seniority carryover in the national and regional separate contracts for city and road truck drivers, so as to eliminate any continuing effects of discriminatory hiring policies	14

II. An integrated local labor union, the majority of whose members are Mexican-American and black, does not violate either 42 U.S.C. Section 2000e-2 or 42 U.S.C. Section 1981, solely because of the operational effects of the employer's hiring practices upon a collective bargaining agreement which is racially neutral and so administered 20

Conclusion 26

CITATIONS

Cases

Alexander v. Gardner-Denver, 415 U.S. 36 19

Bing v. Roadway, 485 F 2d 481 23

Brotherhood of Teamsters and Cal. Trucking Ass'n, 194 NLRB 674 .....9, 19

Doud's v. Longshoremen, 241 F 2d 278 16

Emporium Capwell v. Western Addition Community, 95 S Ct. 977 .....19, 20

Herrera v. Yellow Freight, 505 F 2d 66 .....1, 3, 5

NLRB v. American Nat. Insurance, 343 U.S. 395 15

NLRB v. Electrical Workers, 266 F 2d 349 16

NLRB v. Truck Drivers Local 449, 353 U.S. 87 17

NLRB v. Borg-Warner, 356 U.S. 342 16

Quarles v. Phillip Morris, 277 F. Supp. 842 25

Rodriguez v. ETMF, 505 F 2d 40 1, 3, 7, 10, 11, 14, 18, 21, 22

Resendis v. Lee Way, 505 F 2d 69 .....1, 3, 5

Sabala v. Western Gillette, 516 F 2d 1251 5

Sabolsky v. Budzanoski, 457 F 2d 1243 17

Thornton v. ETMF, 419 F 2d 416 .....18, 24, 25

United Paperworkers v. U.S., 416 F 2d 980 25

U.S. v. Central Motor Lines, 33 F Supp 532 24

United States Statutes

28 USC Section 1254(1) 2

29 USC Section 158(b)(3) 2, 16

29 USC Section 159(a) 2, 15, 19

29 USC Sections 501(a) and (b) 17

42 USC Section 1981 .....2, 3, 6, 13, 14, 20, 23, 25

42 USC Section 2000e 2, 12, 20, 23, 25

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Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Fifth Circuit

BRIEF FOR THE PETITIONER
Teamsters Local Union 657

OPINIONS BELOW

The opinions of the Court of Appeals in the cases at bar are reported, as follows: *Rodriguez v. East Texas Motor Freight*, at 505 F 2d 40, *Herrera v. Yellow Freight System, Inc.*, at 505 F 2d 66, and *Resendis v. Lee Way Motor Freight, Inc.*, at 505 F 2d 69. The *Rodriguez* opinion is reproduced in the Appendix (App. 68-111).

The Trial Court's Findings of Fact and Conclusions of Law in *Rodriguez* are reproduced in the Appendix beginning at page 55.

JURISDICTION

The judgments of the Court of Appeals were entered, in all three cases, on November 25, 1974. A petition for rehearing was filed in each case and all three were denied by orders entered on August 18, 1975.

A single petition for a writ of certiorari to review the judgments in the three cases was filed by Teamsters Local Union 657 on November 1, 1975, and was granted May 24, 1976. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 702, (a) through (j), 42 U.S.C. Section 2000e-2 (a) through (j) of the Civil Rights Act of 1964, as amended (App. 451-456).

42 U.S.C. Section 1981 (App. 451).

Sections 8(b)(3) and 9(a) of the National Labor Relations Act, as amended, 29 U.S.C. Sections 158(b)(3) and 159(a) (App. 450-451).

QUESTIONS PRESENTED

I

Whether the duty of a local labor union to represent employees under 42 U.S.C. Section 2000e-2 and 42 U.S.C. 1981, as imposed by the Court of Appeals in the cases at bar, conflicts with the restrictions placed upon a local union by 29 U.S.C. Sections 158(b)(3) and 159(a), in its representation of employees.

II

Whether an integrated local labor union, the majority of whose members are Mexican-American and Black, which has followed the instructions of its membership in negotiations on collective bargaining agreements, is nevertheless responsible, under 42 U.S.C. Section 2000e-2 and 42 U.S.C. 1981, for any discriminatory "lock-in" effects flowing from the operation of hiring practices upon such contracts which have been negotiated and ratified on a National and Regional basis.

STATEMENT OF THE CASE

A

The Nature of the Cases and Parties Involved.

All three of these cases allege violations by the Petitioners of rights secured to Respondents by Title VII of the Civil Rights Act of 1964, as amended, and 42 U.S.C. 1981. The substance of the violations alleged are the same in each of the cases. They are, that Respondents were discriminatorily denied employment as road truck drivers by their respective employers, and that this discrimination was founded on their race and national origin (App. 7-19).

They also complain of "no-transfer" practices by their employers, which they say discriminatorily precluded their "transfer" from their jobs as incumbent city truck drivers to jobs as road truck drivers, at company terminals where such jobs existed (App. 10-11).

As to the Union Petitioners, Respondents main complaint is that the seniority systems in effect at their terminals of employment, pursuant to collective bargaining agreements between the various employers and the unions, had the effect of locking them in their jobs as city drivers. They contend that this so-called "lock-in" perpetuated the discriminatory hiring practices (App. 11-13).

The reply of Petitioner Local 657 is that it is not responsible for the hiring practices of the employers, and that in the applicable collective bargaining proceedings, it has followed the instructions of its affected membership relative to the negotiation of their contractual rights to seniority and transfer between jobs (App. 24-25).

This Petitioner also says that it cannot singularly make changes in National and Regional collective bargaining agreements that would affect other local unions and their members, because multi-employer, multi-union agreements, as regulated by the National Labor Relations Act, require the concurrence of the employer and other local unions involved (App. 23-24).

The separate job classifications involved in the cases at bar are those of "road" or "line driver" and "city, pickup and delivery driver." The former drive equipment between the various terminals of the defendant truck lines, while the latter deliver freight locally (App. 70).

The *Rodriguez* case was brought by three individuals working as city truck drivers for East Texas Motor Freight, Inc. (Petitioner ETMF) at its terminal in San Antonio, Texas. The named Plaintiffs sue on their own behalf and on behalf of all Mexican-American and black city drivers of ETMF in the State of Texas.[1] All three of the named Plaintiffs were members of Local Union 657, whose office is also located in San Antonio (App. 7-9, 15).

The *Herrera* and *Resendis* cases supra, were not brought as class actions, but only on behalf of the named Plaintiffs. In these two suits also, all of the Plaintiffs worked as city truck drivers in San Antonio, Texas, for their respective employers, Yellow Freight System, Inc. and Lee Way Motor Freight, Inc.

The three Defendant truck lines are interstate common motor carriers. Petitioner ETMF, for example, has 52 terminals in 19 states (App. 70). As is the practice in the trucking industry, these truck lines domicile road drivers at only some of their terminals (App. 70).

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[1] We defer to the briefs of ETMF and Southern Conference of Teamsters for the presentation of the argument on the "class action" considerations.

The Defendants, Southern Conference of Teamsters (Petitioner Southern Conference) and Teamsters Local Union 657 (Petitioner Local 657) are labor organizations, affiliated with the International Brotherhood of Teamsters, which was named as a Defendant in only the *Herrera* and *Resendis* cases. Petitioner Local 657 was the collective bargaining representative for all of the named Plaintiffs in the three suits.

The cases were consolidated for oral argument on appeal to the Fifth Circuit Court of Appeals. Such Court has cited them as the "Rodriguez trilogy." *Sabala v. Western Gillette, Inc.*, 516 F2d 1251, 1253 (5th Cir. 1974). The central theme which runs throughout the cases is the nature of the complaint of the Respondents as above set forth.

B

The Trial Court Stipulation in Rodriguez.

At the time of trial, all parties in *Rodriguez* stipulated to certain facts (App. 417-419; R. 74, 5-8). The parts of this stipulation which are relevant to the complaint against Petitioner Local 657 are as follows:

> (a) That Plaintiffs were employed at the San Antonio terminal of ETMF without regard to their race, color or national origin.
>
> (b) The no-transfer rule of East Texas Motor Freight, that is no-transfer between classifications which would include no-transfer from the city to road or road to city has been uniformly applied without regard to race, color or national origin.
>
> (c) Except for one road driver acquired by merger with another company, ETMF has never had road drivers domiciled in San Antonio.

(d) That prior and subsequent to the effective date of the Civil Rights Act of 1964 to the date that a charge of discrimination was filed with the Equal Employment Opportunity Commission by Plaintiff Rodriguez, East Texas Motor Freight had never employed a Negro or Mexican-American as a line driver in the State of Texas.

(e) That the claims of discrimination by Plaintiffs "is solely based upon the fact that after their original employment they have been locked-in to the lower paying job of city driver" because of separate seniority rosters and because if they did transfer they would lose their accumulated city seniority.

As to the employer, Petitioner ETMF, it was stipulated that the only issue before the Court was whether the failure of ETMF to consider Plaintiffs' line driver applications was a violation of Title VII and 42 U.S.C. Section 1981 (App. 419; R. 74, 7-8).

C

Statistical Evidence, Applications, and Responsibility for Hiring.

Introduced into evidence are personnel rosters for the corporate headquarters and each terminal of ETMF in the State of Texas (App. 352-415; R. 74, 6). These give the name, employment date and job classification of each employee as of February 29, 1972.

Those employees of ETMF who held jobs as road drivers, as of November 14, 1972, are also shown on ETMF's road, or line driver, terminal seniority roster of November 14, 1972 (Pl. Ex. 26; R. 74, 6). This roster not only lists the names and seniority dates of the road drivers, but also the local teamster union which represents them as members and employees.

None of them are members of Petitioner Local 657. These personnel rosters form the basis of the above stipulation that ETMF has never employed a Mexican-American or Negro as a line driver in the State of Texas.

Since 1952, a majority of the employees working for ETMF within the jurisdiction and membership of Local 657 have been blacks and Mexican-Americans, as is noted by the Fifth Circuit in *Rodriguez* (App. 99 and 422; R. 74, 19-20).

In August, 1970, each of the named Plaintiffs made a written application to the terminal manager of ETMF at San Antonio, Texas for jobs as road drivers with the company (App. 324-26; R. 74, 6). The treatment of these applications by ETMF is the subject of the stipulation stated above relating to the issue between Plaintiffs and ETMF.

The hiring of employees by ETMF in the case at bar is exclusively a management function. The company has always exercised full responsibility for hiring and Local 657 has never exercised any (App. 99). We do not believe that there is any dispute about this point.

On several occasions, over a considerable period of time in 1969 and 1970, Petitioner Local 657, through its President, requested ETMF to give jobs as road drivers to the three named Plaintiffs in Rodriguez at locations where such jobs existed (App. 195-197, and 235-237). The ETMF official to whom these requests were made, did not reject them on the grounds of a company policy prohibiting "transfers" from city to road jobs, and did not recall having mentioned the company's "no-transfer" rule (App. 237).

Petitioner Local 657 had no voice in the institution and/or publication of ETMF's "no-transfer" rule (App. 310).

D

Jurisdiction and Membership of Local 657.

The Charter of Local Union 657, granted to it by the International Brotherhood of Teamsters, gives it a geographical jurisdiction that is limited to several counties in South Texas (App. 425; R. 74, 19-20). It is an integrated local labor union, and since 1965 the majority of its total membership has been Mexican-American and black (App. 421; R. 74, 19-20). Since 1970 the majority of the members of the seven man Executive Board of Petitioner Local 657 have been Mexican-American and Negroes (App. 193-194).

The employees and members of Local Union 657 who work for the various truck lines under the National Master Freight Agreement, and its Southern Conference Supplements, constitute a separate and distinct bargaining unit apart from its total membership, for purposes of collective bargaining with their truck line employers. During the period from January, 1965 to January 1972, Mexican-Americans and Negroes have been in the majority in this unit of the Local 657 membership (App. 420; R. 74, 19-20).

E

The Contracts in Issue and the Negotiation Thereof.

The initial organization and representation, by entities of the Teamster's Union, of employees of Respondent ETMF who work as line drivers in this area, took place in 1951. At that time, ETMF domiciled line drivers only at its terminals in Dallas, Texas and Texarkana, Texas. A separate collective bargaining agreement covering only line driver jobs was executed in 1951 by ETMF and the involved Teamster Union Affiliates (App. 308-309).

Petitioner Local 657 has never been a party to a contract with ETMF covering wages, hours and working conditions of road or line drivers (App.72, 193-194). All of its contracts with ETMF since 1950 have been agreements covering only employment conditions of city drivers (Local 657 Exhs. A,B,C, D,E,F. and G; R. 74; Plff's. Exhs. 13,14,15 and 16; R. 14). Since February, 1964 the National Master Freight Agreement, and its Supplements applicable to the Southern Conference area, have been in existence.

There does not seem to be any dispute as to the procedure that was followed in the negotiation and ratification of the National Master Freight Agreement and its Southern Conference Supplements. This procedure is fully described in *Brotherhood of Teamsters and Auto Drivers, Local No. 70, International Brotherhood of Teamsters and California Trucking Association, Inc.*, 194 NLRB 674 aff'd 470 F 2d 509 (9th Cir. 1972), cert. den. 411 U.S. 923.

The National Master Freight Agreement is negotiated on a nationwide basis by authorized representatives of the multi-employer unit of truck lines, and the multi-union unit of local labor unions. The Southern Conference Supplements are negotiated concurrently with the National Agreement, but by different negotiating groups. Like the national agreement, the regional supplements are also negotiated by representatives of participating truck lines and local labor unions. The tentative collective bargaining agreements arrived at by this process are submitted to a national and regional referendum of the affected employees for approval or rejection. *Brotherhood of Teamsters, Local 70, and California Trucking Assn.*, supra, 194 NLRB at 677.

Petitioner Local 657 is affiliated with the International Brotherhood of Teamsters and thereby obligated to abide by the terms of the International Constitution. This instrument

is in evidence as Southern Conference Ex. 1 (R. 74, 20), and Article XVI, Section 4(a) thereof reads, in part, as follows:

> "Area, Multi-Area or National Company-Wide or Industry-Wide Contracts
>
> Section 4(a). If a majority of the affiliated Local Unions vote for area, multi-area or national, company-wide or industry-wide negotiations for an area, national, company-wide or industry-wide contract, all involved affiliated Local Unions shall be bound by such vote, must participate in such area, multi-area or national, company-wide or industry-wide bargaining and shall be bound by the contract approved as provided below. Upon completion of negotiations by a Conference Trade Division, or by any Committee appointed by the General President, subject to the approval of the General Executive Board, to engage in negotiation of an industry, area, multi-area or national or company-wide contract, such contract shall be submitted to the membership covered by said contract proposal for their approval or rejection.
>
> If a majority of the votes cast by Local Union members voting approve such contract it shall become binding and effective upon all Local Unions involved and their members . . ."

From the above described negotiations came the separate contracts, and their seniority provisions, which are criticized by the Plaintiffs. Those covering the years 1967 to 1973 are in evidence in *Rodriguez* as Plaintiffs' Exhibits 13, 14, 15 and 16 (R. 14).

The seniority rules at issue, negotiated into contract supplements, provide for separate job bidding and lay-off seniority for city motor freight employees and road motor freight employees of the respective employers. There are no provisions

that prohibit city drivers from becoming road drivers. However, the agreements do provide for job bidding and lay-off seniority at the terminals of their employment, for all employees with the particular road or city bargaining units beginning with the date of entry of the particular employee into that bargaining unit.

Prior to the commencement of negotiations on these contracts, Petitioner Local 657 has called its affected membership into special meetings for the purpose of determining the changes or additions that such members wanted sent to the negotiating committees for submission to the employers for inclusion in subsequent contracts (App. 193-194).

The President of Local 657 testified in *Rodriguez* that at these special meetings none of the named Plaintiffs, or any other employee of ETMF, had (a) ever complained of discrimination by ETMF against Mexican-American and Negroes, (b) ever requested one contract for road and city drivers, or (c) ever requested the right to carry city seniority to road jobs (App. 193-194; R. 74, 332-333). The Plaintiff Rodriguez supported this by his statements that (a) he personally had never heard any other ETMF employee complain to Local 657 about discrimination, and (b) that he had never requested Local 657 to take action about loss of company seniority on transferring to a road job, and that he had never heard any other ETMF employee make such a request (App. 275-276).

After the trial of Rodriguez was completed, but before judgment was entered, Petitioner Local 657 held another of these special meetings of its members working under the National Master Freight Agreement, and Southern Conference Supplement, to obtain their demands for contract changes for the then upcoming contract negotiations. The matter of seniority "carry-over" came up at this meeting and those present voted to retain the existing contract seniority provisions. Even a proposal for

a one-time-only entry into the road driver unit, similar to that which was later suggested by the Fifth Circuit in this case, was rejected by the members present. The majority of those present and voting were Mexican-American and Negro city drivers (App. 46-48; R. 58).

F

Decisions of the Courts Below.

The Trial Court concluded that none of the Petitioners had violated Title 42 U.S.C. Section 2000e-5, or any section of Title 42 relating to race discrimination. It also refused to certify the case as a class action (App. 66-67).

The Court of Appeals for the Fifth Circuit reversed the Trial Court (App. 68-69). As to Petitioner Local 657, the ground for the reversal was Local 657's "role in establishing separate seniority rosters that failed to make allowance for minority city drivers who had been discriminatorily relegated to city driver jobs, . . ." (App. 101).

SUMMARY OF ARGUMENT

1. Petitioner Local 657 did not violate the Civil Rights Acts by reason of its failure to negotiate certain contract terms which its membership did not authorize it to submit to the multi-union committee to which Petitioner assigned its bargaining rights for negotiation of national and regional collective bargaining agreements. Under the National Labor Relations Act, Petitioner was legally obligated to sign, and comply with, the agreements negotiated and ratified by the multi-union bargaining unit. The employer, ETMF did not have road driver jobs within the representation jurisdiction of Petitioner's Local 657. Therefore, Petitioner's withdrawal from the multi-union bargaining unit would not have enabled it to make demands for contractual right to such jobs.

2. Petitioner Local 657 being an integrated local union, the majority of whose members are Mexican-American and Negroes, and whose actions relative to the negotiation and administration of collective bargaining agreements have been racially neutral, should not be held to have violated the Civil Rights Act of 1964, or 42 U.S.C. Section 1981, solely because of the hiring practices of an employer, outside the representation jurisdiction of Petitioner Local 657.

ARGUMENT

I

The National Labor Relations Act Bars Local 657 From Singularly Effecting Changes in National and Regional Collective Bargaining Agreements Approved by a Majority of the Multi-Union Bargaining Unit. Since Local 657 Has Not Committed Any Other Act of Commission or Omission in Violation of Law, It Should Not Be Held to Have Violated the Civil Rights Act of 1964 or 42 U.S.C. Section 1981 Solely Because It Did Not Effect Some Type of Seniority Carryover in the National and Regional Separate Contracts for City and Road Truck Drivers, So as to Eliminate Any Continuing Effects of Discriminatory Hiring Policies.

We respectfully submit that the Court of Appeals has imposed liability upon Petitioner Local 657 for failing to effect certain changes in its collective bargaining agreements, without taking into consideration the restrictions of the National Labor Relations Act upon it in the contract negotiations. Even the Respondents in *Rodriguez* state, in their Brief in Opposition to the Petition for Certiorari at page 23, that:

> "Petitioner Local 657 correctly argues that it could not, acting alone, have effected any relief for Plaintiffs' class."

They concede the legal limitations upon this Petitioner's ability to negotiate contractual seniority rights with the employer for road driver jobs.

The only complaint that Respondents make against Local 657 is that there are separate seniority rosters, and if they presently transfer to road jobs they lose their accumulated city seniority. This is their stipulation. The only reason that the Court of Appeals held Petitioner Local 657 liable is because it "established" separate rosters, or contracts, that did not contain some type of provision to eliminate the effects of discriminatory hiring practices. We submit that in arriving at this conclusion the Fifth Circuit has overlooked several material facts that are involved in this case.

The Respondents, as a remedy for their complaints, request the Court to merge the city driver and road driver seniority rosters of ETMF. The Fifth Circuit rejected this and stated an alternative method that a Court might order used. Petitioner Local 657 could not, and cannot, institute and make operative any method, without the consent and agreement of ETMF. A local labor union does not have any authority to impose wages, hours or working conditions upon an employer, except through the process of collective bargaining, as it is regulated by the *National Labor Relations Act*, as amended. 29 U.S.C. Section 159 (a) et seq.

In *National Labor Relations Board v. American National Insurance Co.*, 343 U.S. 395 (1952), which involved a charge against the employer of refusing to bargain, this Court stated:

> "The National Labor Relations Act is designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers. The Act does not compel any agreement whatsoever between employees, and employers. Nor does the Act regulate the substantive terms governing wages, hours and working conditions which are incorporated in an agreement."

Petitioner Local 657 did not violate the civil rights of Respondents by reason of its role in the negotiation of the National Master Freight Agreement and Southern Conference Supplement because Respondents, and their fellow members of Local 657, directed the organization's conduct relative to the contracts, and made no complaint that they were racially discriminatory. How-

ever, this part of Petitioner's argument is reserved for later discussion.

As stated above, the only way that Local 657 could have obtained the contractual rights Plaintiffs seek, was through the process of collective bargaining,[2] and the failure to obtain them is the basis for imposition of liability upon this Petitioner by the Court of Appeals.

Petitioner might have refused to assign its bargaining rights to the National and Regional negotiation committees, and negotiated directly with ETMF for a collective bargaining agreement covering only the ETMF employees within the representation jurisdiction of Local 657. In such event, it would immediately have been faced with the fact that there were no road driver jobs within its jurisdiction. Insistence upon rights to such jobs outside its jurisdiction would have constituted a refusal to bargain by Local 657. *National Labor Relations Board v. Worster Division of Borg-Warner*, 356 U.S. 342, 1958; *Doud's International Longshoremen's Assn.*, 241 F 2d 278 (2nd Cir. 1957). Such a position would have also brought Local 657 into a jurisdictional dispute with the local union representing such road drivers.

In *N.L.R.B. v. International Brotherhood of Electrical Workers*, 266 F 2d 349 (1959), the Fifth Circuit found a local labor union to be violating 29 U.S.C. Section 159(b)(3) by insisting, as a condition of any agreement, that the bargaining unit be enlarged to include certain operations of the employer being performed by members of another union.

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[2] Respondents do not contend that they ever requested Petitioner to institute legal proceedings, or charges with the National Labor Relations Board, to remedy discrimination against them by ETMF. Nor is there any evidence in the record that any employee of ETMF ever filed a grievance against ETMF under the contract grievance procedure, alleging discrimination. The President of Local 657 testified that none of the named Plaintiffs ever requested Local 657 to take any formal action against ETMF over its no-transfer policy (App. 193).

If the officers of Local 657 had failed to forward the proper bargaining authority to the negotiating committees, as mandated by the members, they would have violated the Landrum-Griffin amendments to the *National Labor Relations Act*, 29 U.S.C. 501(a) and (b), as well as the Union Constitution. Section 501 creates a fiduciary obligation in union officers to follow and execute the mandates of the union constitution, the by-laws and the resolutions of the union's governing bodies adopted thereunder. *Sabolsky v. Budzanoski*, 457 F 2d 1243 (3rd Cir. 1972), cert. den. 409 U.S. 853 (1972). The ruling below authorizes a few members of the Union to present themselves as class representatives of the very class which participated in issuing the offending instructions to the Local Union and to recover for the class attorney's fees and/or damages from the Local Union treasury on account thereof.

The participation by the Petitioner in the nationwide and area-wide negotiations is not to be condemned because such form of collective bargaining furthers the national labor policy of promoting industrial peace. In *National Labor Relations Board v. Truck Drivers Local Union 449*, 353 U.S. 87 (1957), this Court stated:

> "The debates over the proposals demonstrate that Congress refused to interfere with such bargaining because there was cogent evidence that in many industries the multi-employer bargaining basis was a vital factor in the effectuation of the national labor policy of promoting labor peace through strengthened collective bargaining."

Since ETMF did not have any road driver jobs within the jurisdiction of Local 657, its only means of obtaining contractual rights to such jobs for its members at distant terminals was by contract negotiations through the Nationwide and Southern Conference bargaining units. Respondents could have requested the right they now seek in this case but they

did not do so. The officers of the Local 657 did not have authority to submit such contract demands to the negotiating committees in the absence of membership authorization. Had they done so they might well have violated their fiduciary responsibilities.

If it is contended that Petitioner Local 657 should have made a demand to the negotiating committee for contractual rights to road jobs, without having authorization from the affected members, the question arises as to specifically what contractual terms should have been requested. If a request had been made for a state wide merged seniority of road and city drivers, it no doubt would have been rejected by ETMF. Such a demand was made of the same employer, and rejected, in *Thornton v. East Texas Motor Freight*, 497 F.2d 416, 425 (6th Cir. 1974). Even if ETMF would have agreed to such a merger of seniority, then Local 657 would have run into the wrath of its members who oppose such a provision.

Regardless of what contention is made, as to contract proposals that might have been submitted, with or without express membership authorization, such proposals had to be approved by the multi-union unit, and the employer, ETMF. Petitioner should not be held liable on the assumption that such approval would have been given, if requested.

The opinion of the Fifth Circuit in *Rodriguez* appears to require Petitioner to monitor the hiring practices of ETMF at its geographically distant terminals, in order to try to protect itself against charges of discrimination in San Antonio, Texas. If statistics showing a racial imbalance in the road driver complement are all that is necessary to prove discrimination, then there is a potential liability on the part of Local 657 in San Antonio, Texas for hiring practices in Atlanta, Georgia, if the scope of the class were extended to the entire Southern Conference. As bargaining representative for Respondents, Local

657 has no authority under the National Labor Relations Act to inquire into, much less control, ETMF hiring practices in Dallas, Texas or Atlanta, Georgia.

Having entered into nationwide bargaining pursuant to express instruction of the membership, Petitioner Local No. 657 was duty-bound to sign the contract following its negotiation and ratification on a nationwide basis. *Brotherhood of Teamsters & Auto Truck Drivers Local No. 70, International Brotherhood of Teamsters and California Trucking Association, Inc.*, supra. This case held that a Teamster local union which had participated in bargaining, as did this Petitioner, violated Section 8(b)(3) of the National Labor Relations Act, as amended, 29 U.S.C. 158(b)(3), when it refused to sign the contract. The decision below holds that Petitioner Local 657 rendered itself liable when it discharged the legal duty of signing the contract. The decision presents a serious conflict between the National Labor Relations Act and the Civil Right Acts, and threatens to disturb the well developed body of law under the former which requires the execution of a contract which has been successfully negotiated to its conclusion. At the very least it would be highly disruptive to industrial peace to require participating local unions in multi-union bargaining situations to refuse to sign duly bargained contracts by quibbling about their legality on pain of financial liability.

To the extent that the decision of the Court of Appeals fixes liability on Petitioner Local 657 because it delegated authority to the national bargaining committee and because it executed the subsequently-negotiated contract, it conflicts with the decision of this Court in *Emporium Capwell Co. v. Western Addition Community Organization*, 95 S. Ct. 977 (1975), decided February 18, 1975. The operative facts which create financial liability, according to the Court of Appeals, are routine steps in the statutory collective bargaining procedures contemplated by the National Labor Relations Act. In the *Emporium Cap-*

well case this Court made clear that the exclusive, majority-controller bargaining procedures of the Taft-Hartley Act, as well as the internal regulations of unions in the Landrum-Griffin amendments, are still intact notwithstanding the passage of Title VII of the Civil Rights Act of 1964. In that decision at Footnote 26, 95 S. Ct. at page 990 as in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) at page 48, Footnote 9, this Court has twice noted Senator Clark's interpretive memorandum concerning Title VII that "nothing in Title VII or anywhere else in this Bill affects rights and obligations under the NLRA . . ." Under these authorities it was not incumbent upon Petitioner Local 657 to refuse to participate in the existing bargaining structure, or to forego the economic benefits thereof, or to go it alone in a futile effort to negotiate contractual rights to jobs outside its representation jurisdiction. If such action is demanded by Title VII it is certain that the chances for industrial strife are enhanced while the benefits of collective strength are eliminated. Both results would conflict with statutory policies reviewed in the *Emporium Capwell* decision.

Petitioner Local 657 respectfully says that the Court of Appeals has imposed an obligation on it for failing to do something which it was legally barred from accomplishing under the facts of this case.

II

An Integrated Local Labor Union, the Majority of Whose Members Are Mexican-American and Black, Does Not Violate Either 42 U.S.C. Section 2000e-2 or 42 U.S.C. Section 1981, Solely Because of the Operational Effects of the Employer's Hiring Practices Upon a Collective Bargaining Agreement Which Is Racially Neutral and So Administered.

Petitioner Local 657 did not participate in the negotiation and execution of the first collective bargaining agreement between ETMF and Teamster Union affiliates, covering the jobs

of road drivers. According to the testimony of an ETMF official, the first of the separate contracts for road drivers in Texas was executed in 1951. It applied to such jobs and personnel located and domiciled in Northeast Texas at company facilities in Dallas and Texarkana. There is no evidence that Local 657 even knew that such separate contract was being negotiated.

Since Local 657 has never had any voice in who ETMF hired as a line driver, and it did not participate in the original contractual separation of city and road seniority, it cannot be said that it was a party to any discrimination chargeable to the institution of the separate agreements. This puts Local 657 in a different position from that of those labor organizations found to have violated civil rights of employees because they were present and participated in the original departmental segregation for reasons of race or national origin.

The involvement of Local 657 in the continuation of separate contracts has been circumscribed by its participation in the National and Regional negotiations described above. This participation has been limited to relaying the contractual demands of its members to the negotiating committees, and the signing and administration of the contracts applicable to city drivers.

There is no dispute about the contracts being racially neutral on their face. Furthermore, there is no issue as to whether they have been administered without regard to race, color or national origin.

None of the named Respondents in *Rodriguez*, or any other employee of ETMF, ever complained to Local 657, prior to the filing of charges with the Equal Employment Opportunity Commission that ETMF discriminated against Mexican-Americans and blacks. Nor did any of Respondents ever request Petitioner to forward to the negotiating committees a demand for contractual rights to road jobs with accumulated seniority. The requests

that Rodriguez, Perez and Herrera did make to Local 657 for assistance in transferring to road jobs, and which help they received, cannot be equated with a complaint to Local 657 of racial discrimination or dissatisfaction with their contract. There is no evidence to support a finding that Petitioner Local 657 acquiesced in any discrimination.

Petitioner does not now, and never has, opposed the efforts of Respondents to become road drivers. Furthermore, if any of them have been discriminatorily denied such jobs, they are entitled, not only to the jobs, but also to their "right[illegible]place" seniority on the road driver seniority rosters.

It is not logical to base a finding of civil rights violations, by an integrated Mexican-American and Negro dominated local union, solely upon hiring practices and departmental seniority, especially where the jobs in question did not even exist within the jurisdiction of the union.

The facts of this case bring into focus the dilemma of Petitioner in trying to resolve the conflicting demands of its membership relative to contractual rights with ETMF, and other truck line companies. Shortly after the trial in *Rodriguez* was completed, there was a special meeting of the members of Local 657 working under the National Master Freight Agreement and the Southern Conference supplement. Some of the members proposed, for the first time, the submission of requests for contractual rights for city drivers to transfer to road jobs with accumulated city seniority. All of the proposals, over which there was a division of opinion, were submitted to a vote and rejected. Mexican-American and Negro city drivers constituted a majority of those in attendance.

We are aware that the constitutional and statutory rights of individual members cannot be denied by a majority vote. However, neither should the majority be penalized for exercising its

franchise on disputed issues where that majority is Mexican-American and Black, and there is no evidence that the majority's vote was for the purpose of perpetuating discriminatory hiring practices.

The Court of Appeals rejected Respondents' prayer for merger of the seniority rosters, and suggested an alternative method for eliminating any "lock-in" effects of discriminatory hiring. This alternative would give Respondents one opportunity to move to road jobs with city seniority.

As stated above, Local 657 does not oppose Respondents being given road jobs, but strongly objects to a finding that it violated 42 U.S.C. 2000e-2 and 42 U.S.C. 1981 because they were not given such jobs sooner. The very relief which the Fifth Circuit now gives Respondents is simply a court enforcement of a right they have always had under the contracts involved.

There are no provisions in the collective bargaining agreements which kept ETMF from hiring Respondents into the road driver unit when they were originally employed. Furthermore, there are no provisions in such contracts which have prohibited ETMF from hiring them into the road driver unit, after they had become regular city drivers. Respondents stipulated that their original employment by ETMF was without regard to race, color or national origin. Therefore, if they had been given jobs in the road driver unit, after becoming city drivers, there could not have been any "continuing effects" of discriminatory hiring, by reason of not being able to "carry-over" their city seniority.

They could have been either originally hired as road drivers, or subsequently hired into the road unit from their city jobs. In either event they would have acquired the seniority that the Court of Appeals now says should be granted them. If they

have been discriminatorily denied such jobs, and resulting seniority, it is the result of hiring practices, and not the Petitioner's failure to negotiate into the contracts the remedy found appropriate by the Court of Appeals.

The Fifth Circuit cites *Thornton v. East Texas Motor Freight*, 497 F 2d 416 (6th Cir. 1974); *Bing v. Roadway Express*, 485 F 2d 441 (5th Cir. 1971); and *United States v. Central Motor Lines, Inc.*, 338 F Supp. 532 (W.D.N.C. 1971), in connection with its statements on how Local 657 might have eliminated the "lock-in" effects of separate contracts.

In the *Thornton* opinion at page 425, the Court states:

> "It is argued that the rule nevertheless perpetuated past discrimination against blacks. But this was discrimination by the company against blacks, and not by the union.
>
> The employment of drivers for over-the-road driving was a management function exercised exclusively by the company and without interference by the union.
>
> Traditionally, from the inception of collective bargaining, city and over the road drivers have been placed in separate unions for collective bargaining purposes. The National Labor Relations Board has long held that this separation is appropriate. In *Re Georgia Highway Express*, 150 NLRB at 1649 (1965). Separate Collective bargaining agreements cover each unit. There was no proof that the race of the persons had anything to do with the establishment or maintenance of these separate units."

This Court's attention is called to the fact that the same National and Regional Collective bargaining agreements, the same employer, ETMF, and the same contention relative to perpetuation of discrimination, were all involved in the *Thornton* case, as are present in the instant case.

The Sixth Circuit further stated in *Thornton*, at page 425, that:

> "It is noteworthy that there is no evidence or finding that the union connived or conspired with the company, or with anyone else, to discriminate against the plaintiffs. As we will point out, it is indeed very questionable whether the union ever acquiesced, let alone acquiesced for fear of offending its white city drivers who were just as much interested in eliminating the no-transfer rule as were the black drivers. . . .
>
> It should be pointed out further that the collective bargaining agreements which were entered into between the Southern Conference, the International Brotherhood of Teamsters and the company, contained no provision prohibiting transfers. . . .
>
> We are of the opinion, for the reasons stated, that the finding of the District Court against the union, as above set forth, is not supported by substantial evidence, and is clearly wrong"

As we interpret the Court's opinion *Thornton*, it states, in substance, that in the absence of some discriminatory act of commission or omission by the local union, in the creation or continuance of the separate contracts, that such union entity cannot be held liable, solely on the theory of perpetuation of past discriminatory hiring practices.

Quarles v. Phillip Morris, Inc., 271 F Supp. 842 (E.D. Va. 1967); and *United Papermakers and Paperworkers v. United States*, 416 F 2d 980, cert. denied 397 U.S. 919 (1970), in which the perpetuation of discrimination rule was formulated, involved situations in which the unions participated in discriminatory segregation of blacks and whites under separate contracts, even to the point of establishing separate locals to administer the contracts. They should not be cited as authority for holding Petitioner Local 657 liable for violating 42 U.S.C. Section 2000e-2 or 42 U.S.C. Section 1981, in the factual context of this case.

CONCLUSION

Petitioner Local Union 657 prays that the judgments of the Court of Appeals be reversed in all three of the above cases, and that the judgments of the Trial Court dismissing the complaints against this Petitioner be affirmed.

Respectfully submitted

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Supreme Court, U. S.
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No. 75-651 and 75-715

IN THE

Supreme Court of The United States

OCTOBER TERM, 1975

TEAMSTERS LOCAL UNION 657,
vs
Petitioner
ERNEST HERRERA, TRINI URIBI, and MARIO MELCHOR,
Respondents
and
TEAMSTERS LOCAL UNION 657,
Petitioner
vs
PATRICK RESENDIS, TONY ESCOBEDO, and
ELIAS GONZALEZ,
Respondents
and
SOUTHERN CONFERENCE OF TEAMSTERS,
Petitioner
vs
ERNEST HERRERA, TRINI URIBI, and MARIO MELCHOR
Respondents
and
SOUTHERN CONFERENCE OF TEAMSTERS,
Petitioner
vs
PATRICK RESENDIS, TONY ESCOBEDO and
ELIAS GONZALEZ,
Respondents

On Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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INDEX

Page

Statement of the Case 1

Nature of the Case 1

Statement of Facts 3

Question Presented 3
That the maintenance of separate senority rosters by The Southern Conference of Teamsters and administered by Local Union 657 resulted in a discriminatory lock in to lower paying jobs and prevented these Respondents from obtaining higher paying line driving jobs.

A. The Southern Conference of Teamsters 3

Argument and Authorities 3

B. Local 657 11

Argument and Authorities 11

Conclusion 14

Certificate of Service 15

CASES CITED

Pages

Alabama vs. United States,
5 Cir. 1962, 304 F. 2d 583, 586, affirmed 371
U.S. 37, 83 S. Ct. 145, 9 L Ed 2d 112 5

Albermarle Paper Co. vs. Moody,
422 U.S. 405, 95 S. Ct. 2362; 45 L. Ed 289 (1975) 7

Bing vs. Roadway Express Inc.,
5 Cir. 1971, 444 F. 2d 686 6

Cypress vs. Newport News General and
Nonsectarian Hosp. Assn.,
4 Cir. 375 F. 2d 648, 654 6

Griggs vs. Duke Power Co.,
1971 401 U.S. 424, 430, 91 S. Ct. 849, 28 L. Ed 2d 158 5

Franks vs. Bowman Transportation Co.,
..... U S. ..... 47 L. Ed 2d 444 ..... 7, 8, 13

Jones vs. Lee Way Motor Freight,
10 Cir. 1970, 431 F. 2d 245 cert. denied 401 U.S. 954 6

Local 189 United Paper Makers and
Paper Workers vs. United States,
5 Cir. 1969, 416 F. 2d 980, 990-991, cert. denied,
397 U.S. 919, 90 S. Ct. 926, 25 L. Ed 2d 100 ..... 5, 10

Pettway vs. American Cast Iron Pipe Co.
5 Cir. 1974, 494 F. 2d 211 236 5

Quarles vs. Philip Morris, Inc., E.D.Va.,
1968, 279 F. Supp. 505 10

Resendis vs. Lee Way Motor Freight Inc.
5 Cir. 1974, 505 F. 2d 69 13

Sager vs. Yellow Freight System Inc.,
5 Cir. 1976, 52 F. 2d 72 ..... 9, 10, 11

United States vs. Hayes International Corp.
5 Cir. 415 F. 2d 1038, 1043 6

United States vs. Jacksonville Terminal Co.,
5 Cir. 1971, 451 F. 2d 418 cert. denied,
406 U.S. 906 Local 189 10

CASES CITED (cont'd)

Pages

United States vs. N.L. Industries, Inc.,
8 Cir. 1973, 479 F. 2d 354, 360 5

United States vs. Pilot Freight Carriers, Inc., M.D.N.C.
1972, 4 FED cases 472 10

United States vs Sheet Metal Workers,
8 Cir. 416 F. 2d 123 6

United States vs. T.I.M.E.D.C.,
5 Cir. 1975, 517 F. 2d 299 10

STATUTES CITED

42 U.S.C. Section 2000 e 2

42 U.S.C. 706 (g) 7

29 U.S.C. Section 160 13

42 U.S.C. Section 1981 10

42 U.S.C. Section 703 (h) 14

No. 75-651 and 75-715

IN THE

Supreme Court of The United States

OCTOBER TERM, 1975

TEAMSTERS LOCAL UNION 657,
Petitioner

vs

ERNEST HERRERA, TRINI URIBI, and MARIO MELCHOR,
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TEAMSTERS LOCAL UNION 657,
Petitioner

vs

PATRICK RESENDIS, TONY ESCOBEDO, and ELIAS GONZALEZ,
Respondents

and

SOUTHERN CONFERENCE OF TEAMSTERS,
Petitioner

vs

ERNEST HERRERA, TRINI URIBI, and MARIO MELCHOR
Respondents

and

SOUTHERN CONFERENCE OF TEAMSTERS,
Petitioner

vs

PATRICK RESENDIS, TONY ESCOBEDO and ELIAS GONZALEZ,
Respondents

STATEMENT OF THE CASE

A. Nature of the Case

All of these Respondents at the time of trial were employed as city drivers in San Antonio, Texas at the time of the filing of their original petitions in the United States District Court for the Western District of Texas. Respondents, HERRERA, URIBI and MELCHOR were employed by Yellow Freight Sys-

tem Inc. In cause No. 75-720, management's Petition for Writ of Certiorari was denied however, the Petition for Rehearing is still pending.

Respondents, Resendis, Escobedo, and Melchor were employed by Lee Way Motor Freight, Inc. In cause No. 75-720, this Court denied management's Petition for Writ of Certiorari, however, the Petition for Rehearing is likewise still pending.

All of the above named six Respondents stand before the Court individually as members of Teamsters Local Union No. 657, under the jurisdiction of the Southern Conference of Teamsters.

The complaint of these Respondents simply put, is that because of the maintenance of separate senority rosters for city and road drivers by the Southern Conference of Teamsters and Teamsters Local 657, they have been discriminatorily "locked in" to lower paying city driving jobs, while being denied higher paying line driving jobs. The "lock in" complained of requires the same surrender of senority as does the "no transfer" rule of management which has been held to be discriminatory within the meaning of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000 e. et seq.

B. Statement of Facts

Respondents were all hired at their respective terminals to operate a pickup and delivery service of various freight parcels on a local basis.

Line drivers are long haul drivers and covered under a different contract.

Yellow Freight System did not domicile any line drivers at San Antonio, Texas. They did domicile line drivers at their Dallas and Amarillo terminals. Lee Way did, and still does domicile line drivers at its San Antonio, Texas Terminal.

Question Presented

I.

That the maintenance of separate senority rosters by The Southern Conference of Teamsters and administered by Local Union 657 resulted in a discriminatory "lock in" to lower paying jobs and prevented these Respondents from obtaining higher paying line driving jobs.

A. SOUTHERN CONFERENCE OF TEAMSTERS
Argument and Authorities

In their brief filed in this cause, Petitioner, Southern Conference of Teamsters presents two issues to the Court. The Southern Conference contend:

1. The senority system complained about did not prevent Respondents from transferring to line driving jobs.
2. That the date of entry into the line driving bargaining unit as a senority date does not, in effect lock these Respondents into lower paying city driving jobs.

Respondents take the position as to both Petitioners that the real question to be faced by the Court

is whether there is liability on the part of the Petitioner Unions and if so what guidelines should be set out to govern that liability.

In a broad sense this case presents this Court with the problems of an individual who seeks to better himself in the trucking industry. Obviously, the problems confronting the truck driver are many, especially, if he is a member of a minority group such as these Respondents.

The first barrier city drivers encountered in the trucking industry was the "no transfer" policy of their employers.

This "no transfer" policy disallows a city driver from transferring to a road driving job or seeking employment at another terminal. In order to comply with this regulation a city driver would have to resign his position as a city driver and apply for a road driving job. If this application were unsuccessful the city driver would have no assurance that he would be rehired in his position as a city driver. More than likely his vacancy would be filled and he would find himself unemployed.

Understanding this policy, the city driver then seeks the counsel and advise of his protector and benefactor, his Teamsters Local. Here he hits the second barrier. The Union explains patiently and politely that the Southern Conference of Teamsters, through the collective bargaining process, maintains two separate senority rosters for city drivers and road drivers. This means that if the city driver transfers to the road he has to start at the bottom of the road drivers senority list. This is referred to as the

"no senority carryover" rule. These separate contracts are not contained in the National Master Freight agreement which is negotiated on a nation wide basis but the problem exists because of two supplements to the National Master Freight Agreement negotiated on an area basis by Petitioner, Southern Conference of Teamsters.

Faced with no encouragement from the employer or his union it becomes easy to see that litigation has been the only alternative for obtaining relief for those situated as your Respondents. It goes without saying that the "no transfer" and "no senority carryover" policies are prevalent in the trucking industry. It is also quite obvious, that these policies result in a minority driver being unable to obtain the higher paying jobs because of the dual barriers encountered. The Courts have ruled that these facially neutral policies are violations of Title VII of the Civil Rights of 1964 because they tend to preserve and contnue the effects of past discriminatory practices. See **United States vs. N. L. Industries, Inc.** 8 Cir. 1973, 479 F 2d 354, 360; **Griggs vs. Duke Power Co.,** 1971, 401 U.S. 424, 430, 91 S. Ct. 849, 28 L. Ed 2d 158; **Pettway vs. American Cast Iron Pipe Company,** 5 Cir. 1974, 494 F. 2d 211 236; **Local 189 United Paper Makers and Paper Workers vs. United States,** 5 Cir. 1969, 416 F. 2d 980, 990-991, cert denied, 397 U.S. 919, 90 S. Ct. 826, 25 L. Ed 2d 100.

In approaching the problem of past discrimination, Respondents used the statistical approach approved by this Court in the cases of **Alabama vs. United States,** 5 Cir. 1962, 304 F. 2d. 583, 586, af-

firmed 371 U.S. 37, 83 S. Ct. 145, 9 L. Ed 2d 112; **United States vs. Hayes International Corp.**, 5 Cir. 415 F. 2d 1038, 1043; **United States vs. Sheet Metal Workers,** 8 Cir. 416 F. 2d 123, and **Cypress vs. Newport News General and Nonsectarian Hospital Assn.,** 4 Cir. 375 F. 2d 648, 654.

The statistics in the Lee Way case show that 25 to 30 anglo line drivers were employed at the San Antonio Terminal when Lee Way acquired a controlling interest. Subsequently, Lee Way hired six anglo drivers and one mexican american who was subsequently discharged. Lee Way never hired a negro line driver in San Antonio. Of 44 city drivers at Lee Way 26 or 28 are mexican american, four are black and the remainder are white or anglo.

In the Yellow Freight case some 50 line drivers were employed at the Dallas Terminal and 46 line drivers were employed at the Amarillo Terminal. Yellow Freight employed no mexican american line drivers until after the filing of the complaint in this case.

Under all of the above it becomes clear that the statistics show a pattern of past hiring discrimination. The "no transfer" policy on management's part has been held to be a violation of Title VII of the Civil Rights Act of 1964. See **Jones vs. Lee Way Motor Freight,** 10 Cir. 1970, 431 F. 2d 245, cert denied 401 U.S. 954 and **Bing vs. Roadway Express Inc.,** 5 Cir. 1971, 444 R. 2d 686.

The gist of Respondents contention is that the "no senority carry over" policy is for all intents and

purposes the same thing as management's "no transfer" policy.

This Honorable Court recently recognized the importance of senority and the question of senority awards as a remedy under the Civil Rights of 1964. In the case of **Franks vs. Bowman Transportation Company,** ..... U.S. ....., 47 L. Ed 2d 444, this court noted the importance of senority at 47 L. Ed 2d 462:

> "Senority systems and the entitlements conferred by credits earned thereunder are of vast and increasing importance in the economic employment system of this Nation."

In the **Franks** case (supra), this Court also specifically considered the question of whether or not an award of senority relief was appropriate under Section 706 (g) of Title VII. This Court after discussing the pertinent authorities including **Albermarle Paper Company vs. Moody,** 422 U.S. 405, 95 S. Ct. 2362; 45 L. Ed 289 (1975) concluded that the "make whole" objective of the statute authorized senority awards as a remedy to victims of racial discrimination. In the **Franks** case, at 47 L. Ed 461, this Court speaking through Mr. Justice Brennan, said:

> "Adequate relief may well be denied in the absence of a senority remedy slotting the victim in that position in the senority system that would have been his, had he been hired at the time of his application. It can hardly be questioned that ordinarily such relief will be necessary to achieve the "make whole" purpose of the Act."

At 47 L. Ed 468, Mr. Justice Brennan writing for the majority went on to say:

> "Without an award of senority dating from the time at which he was discriminatorily refused employment, an individual who applies for and obtains employment as an OTR driver pursuant to the District Court's order will never obtain his rightful place in the hierarchy of senority according to which these various employment benefits are distributed. He will perpetually remain subordinate to persons who, but for the illegal discrimination would have been in respect to entitlement to these benefits his inferiors."

The opinion in **Franks,** (supra) goes on to hold that an award of retroactive senority is not required in every case. The rule announced is that the Court must not follow its inclination but its judgment as guided by sound legal principles.

The Respondents would point out the basis of responsibility of the Petitioner, Southern Conference of Teamsters as ruled by the Fifth Circuit is found in **Rodriguez vs. East Texas Motor Freight,** 5 Cir. 1974, 505 F. 2d 40, 60. Here the Circuit Court points out that the collective bargaining agreement is a contract between the employer and the local union and it is a product of both national and regional collective bargaining units. The supplemental agreements questioned in thiss litigation were negotiated by the Southern Conference of Teamsters and administered at the local level by Local 657.

The two questions presented by the Petitioner,

Southern Conference of Teamsters, which both of which your Respondents say should be answered affirmatively, totally and completely over look the effect of the two senority systems that it has negoiated. These separate rosters turn the key to the lock that imprisons Respondents in lower paying jobs.

Since the rulings in your Respondents cases, several other cases have been decided against the unions on the question of liability of the International Brotherhood of Teamsters, The Southern Conference of Teamsters and the Local Union concerning the maintenance of separate contracts for city and road drivers.

In the recent case of **Sager vs. Yellow Freight System Inc.,** 5 Cir. 1976, 529 F. 2d 72, the Fifth Circuit Court of Appeals held that the International Brotherhood of Teamsters also was responsible along with the Southern Conference of Teamsters and the local union for the maintaining of separate senority lists. The unions argued much the same as they do here. They took the position in the **Sager** case (supra) that the agreements on their face are not discriminatory and they had no notice of discrimination at the terminal involved. The Court went on to hold that the obvious influence exerted by the members of the National Negotiating Committee who were also officers of the International Union was sufficient to hold the International Union responsible for the negotiation of the collective bargaining agreements to find liability.

The Fifth Circuit has consistently taken the position that the union organizations have a duty to

inquire into the effect of the contract provisions when it is reasonable to assume that they might lead to discrimination. The unions have an affirmative obligation to protect their membership against illegal discrimination. This duty includes the responsibility to determine if the agreements that they help negotiate lock in, any such past negotiation. See **Sabala vs. Western Gillette,** 362 F. Supp. at 1153.

The cases which discuss and are authority for the reasoning behind liability for the union organizations under the above reasoning are based on the dual idea of the negotiations conducted by the International and the Southern Conference which are administered by the local union. See **Sabala vs. Western Gillette Inc.,** S.D. Texas 1973, 363 F. Supp 1142, aff'd 5 Cir. 1975, 516 F. 2d 1251; **United States vs. T.I.M.E.D.C.,** 5 Cir. 1975, 517 F. 2d 299; **United States vs. Pilot Freight Carriers, Inc.** M.D.N.C., 1972, 4 FEP cases 472.

The Petitioner, Southern Conference of Teamsters further attempts to distinguish the holdings of the Courts in **United States vs. Jacksonville Terminal Co.,** 5 Cir. 1971, 451 F. 2d 418 cert. denied 406 U.S. 906, **Local 189 United Papermakers and Paperworkers vs. United States,** 5 Cir. 1969, 416 F. 2d 980; and **Quarles vs. Philip Morris Inc.,** E.D.Va 1968, 279 F. Supp 505.

The main thrust of the argument is to the effect that these cases were based on the existence of racially segregated local unions. The fallacy of this position is illustrated by the fact that this argument does not take note of the fact that 42 U.S.C. 1981

requires the unions at all levels to inquire and determine whether or not the agreements they negotiate does not perpetuate past discrimination.

B. LOCAL UNION 657

Local Union 657 contends:

1. Since the National Labor Relations Act bars Local 657 from changing provisions of a bargaining agreement once it is negotiated there should be no responsibility on the Local Unions part for resulting discrimination.

2. There is no discrimination on the part of the Local Union because of discriminatory policies on the part of the employer.

Argument and Authorities

The authorities and arguments of Respondents hereinabove contained are equally applicable to the Petitioner, Southern Conference of Teamsters and the Petitioner, Local Union 657.

Briefly stated, Respondents view their "lock in" as the product of a close knit trinity of unions welded into a nationwide bargaining unit. Local 657 attempts to leave the impression that it has nothing whatsoever to do with the creation and preservation of separate senority rosters. The Local Union argues that it could not, acting alone, have effected any relief for these Respondents.

The obvious answer to the argument prsented is found in **Sager vs. Yellow Freight System Inc.,** (supra). The Sager case illustrates the duty imposed on the unions, the local, the area, and the national,

to ascertain whether or not the agreements that they make perpetuate past discrimination.

In **Rodriguez vs. East Texas Motor Freight,** 5 Cir. 1974, 505 F. 2d 40 at page 60 the Fifth Circuit Court of Appeals stated:

> "In our case the supplemental agreements were negotiated by the Southern Conference of Teamsters. From these negotiations come, so far as we are now concerned, two separate agreements, one covering city drivers. The agreements provide for senority to run from the date of entry into a particular collective bargaining unit. At the terminal level, these separate agreements are administered by union locals."

The key to the local union's participation then, Respondents argue is the local unions role as the administrator of an agreement which perpetuates past discriminatory practices.

No one can seriously say that Local 657 was unaware of the effect of the maintenance of the separate senority rosters. It must be pointed out that even if management's "no transfer" policy was completely out of the picture, a city driver would still have to lose his union senority in the event he would transfer to an over the road job. These Respondents see no way to separate management's "no transfer" policy and the unions separate contracts which disallow senority carry over from one bargaining unit to the other.

Petitioner Local 657 argues that the ruling of the Fifth Circuit requires Local 657 to monitor the

hiring practices of employers in the trucking industry. The local union professes to have no voice in who is hired. This could well be the situation however, the Court's attention is directed to the opinion of the Fifth Circuit in **Resendis vs. Lee Way Motor Freight Inc.,** 5 Cir. 1974, 505 F. 2d 69. Lee Way domiciles both city and road drivers at its San Antonio Terminal. The best illustration that Respondents can give concerning union resposibility is that when Lee Way abandoned its "no transfer" policy the minority city drivers would still lose senority because of the discriminatory effect of two separate senority rosters.

In arguing that the National Labor Relations Act bars Local 657 from singularly effecting changes in the collective bargaining agreement, the local union attempts to leave the impression that it is helpless to correct a problem in the trucking industry that has been the subject of much litigation.

In **Franks vs. Bowman Transportation Company,** the Court at 47 L. Ed 2d 464 discusses the provisions of the remedial section of The National Labor Relations Act. 29 U.S.C. Section 160. Generally, the board is upon complaint empowered to hold hearings to determine unfair labor practices and to remedy same. It is suggested and argued on behalf of these Respondents that both Petitioners, the Southern Conference of Teamsters and Local 657 owed a duty to their membership which they failed to pursue under this section of the National Labor Relations Act but preferred to let the discriminatory maintenance of separate senority rosters continue to flourish.

Both Petitioners argue in essence that the sep-

arate senority is "a bona fide senority system" within the meaning of Section 703 (h) of Title VII.

Respondents' position is that the effect of this senority system is discriminatory. A brief look at the statistical evidence shows clearly that there are very few minority over the road drivers. Respondents further contend that there is no practical way that city drivers, a vast majority of which belong to minority groups, would ever be able to transfer to road jobs as long as they are required by the separate contracts to surrender their senority.

CONCLUSION

Respondents pray that the judgments of the Fifth Circuit Court of Appeals be affirmed as to these six Respondents and that this Court order the Trial Court to hold a hearing concerning appropriate remedies.

Respectfully submtted,

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In accordance with the rules of this Court, true copies of the foregoing have been served upon the following counsel of record by placing same in the United States Mail postage prepaid on this 10th day of September, 1976.

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

Nos. 75-651, 75-715, and 75-718
(Consolidated)

No. 75-651
TEAMSTERS LOCAL UNION 657, *Petitioner,*
v.
JESSE RODRIGUEZ, ET AL., *Respondents.*

No. 75-715
SOUTHERN CONFERENCE OF TEAMSTERS, *Petitioner,*
v.
JESSE RODRIGUEZ, ET AL., *Respondents.*

No. 75-718
EAST TEXAS MOTOR FREIGHT SYSTEM, INC., *Petitioner,*
v.
JESSE RODRIGUEZ, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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INDEX

Page

Table of Authorities.....iv

Brief for Respondents.....1

Questions Presented.....2

Counter-Statement of Facts.....3

A. Introduction to the Case.....3

B. Facts Regarding Hiring of Drivers.....5

C. Facts Showing Discrimination, Regardless of Definition Applied.....9

D. The Individuals' Claims.....14

E. Decisions of the Courts Below.....17

Summary of Argument.....22

ARGUMENT —

I. This Case Is Maintainable As A Class Action, Is The Court Of Appeals Held. The District Court Erred In Dismissing The Class Action.....26

A. Introduction.....26

B. Class Action Proceedings Below..27

C. Petitioners Had Adequate Opportunity to Present Their Evidence on the Merits of the Class Action Claims and Did So.....30

D. The District Court Erred in Dismissing the Class Action....33

E. The Fifth Circuit Correctly Held That This Case is Maintainable as a Class Action.....37

II. Plaintiffs Proved A Prima Facie Case Of Discrimination In Hiring And Assignment Of Truck Drivers Throughout ETMF's Texas System.....48

A. Standards of Proof Different From Those Announced in McDonnell-Douglas Corp. v. Green are Applicable to This Class Action Challenging Systemic Discrimination Practices.....48

B. Prima Facie Proof By Statistics and By Patterns and Practices of Discrimination Shifts the Burden of Explanation to Defendants...54

C. Plaintiffs Proved a Prima Facie Case of Hiring Discrimination Against the Class of Minority City Drivers.....64

III. The No-Transfer Rules And Dual Seniorty System Which Locked The Plaintiffs Class Out Of Road Driver Positions Were Unlawful.....74

A. No Transfer Rules.....74

B. The Application of the Dual Seniority System to the Plaintiff Class in this Case was an Unlawful Employment Practice...80

1. The court must reach the seniority issue.....82

2. Defendants' seniority system is not bona fide...85

IV. The Unions Are Liable For Their Practices Of Discrmination Against The Class And For Acquiescing In The Exclusion Of Minority City Drivers From Road Jobs.....93

A. The Unions Did Nothing to Assist Plaintiffs or Other Minority City Drivers to Obtain Road Driver Positions....93

B. Both Local 657 and the Southern Conference are Liable for the Discrimination Practiced Against the Class.....97

C. The Unions Breached Their Duty to Act Affirmatively to Protect the Rights and Interests of Minority Employees.....99

V. The District Court Erred In Prematurely Evaluating Plaintiffs' Qualifications And In Using Improper Standards For That Evaluation...110

A. The District Court Erred in Reviewing Plaintiffs' Qualifications Even Though ETMF Never Considered Their Applications...110

B. It Was Improper To Evaluate Plaintiffs Under Standards Which ETMF Did Not Require Anglo Road Drivers To Meet.... 116

Conclusion..... 121

TABLE OF AUTHORITIES

Cases — Page

Afro-American Patrolmen's League v. Duck, 503 F.2d 294 (6th Cir. 1974).....57

Alabama v. United States, 304 F.2d 583 (5th Cir. 1962) aff'd 371 U.S. 37 (1962).....56

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).....48, 63, 73,118

Alexander v. Gardner-Denver Co.. 415 U.S. 36 (1974).....63, 103, 108

Barnett v. W.T. Grant Co., 518 F.2d 543 (4th Cir. 1975) 38, 56,58

Baxter v. Savannah Sugar Refining Corp., 495 F.2d 437 (5th Cir. 1974) cert. denied 419 U.S. 1033 (1974).....51

Bing v. Roadway Express, Inc., 444 F.2d 687 (5th Cir. 1971).....57, 80

Bing v. Roadway Express, Inc., 485 F.2d 441 (5th Cir. 1973).....34, 83, 84,86

Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969).....38

Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (4th Cir. 1972) ,cert. denied 409 U.S. 982 (1972).....56, 58,59

Carey v. Greyhound Bus Co., Inc. 500 F.2d 1372 (5th Cir. 1974) 100

E.E.O.C. v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975), cert. filed 44 LW 3214 (Sept. 12, 1975).....33, 34

East v. Romine, Inc., 518 F.2d 332 (5th Cir. 1975).....115

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).....44

Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2nd Cir. 1968).....44

Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 (1975)..... 103,105

Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).....100

Franks v. Bowman Transportation Co., 47 L.Ed. 2d 444 (1976).....45, 47, 48, 50, 72, 83, 106, 119

Franks v. Bowman Transportation Co., 495 F.2d 398 (5th Cir. 1974), rev'd 47 L.Ed. 2d 444 (1976) 80, 87, 88,

Freeman v. Motor Convoy, Inc., 409 F. Supp. 1100 (N.D. Ga. 1976).....46, 98

Griggs v. Duke Power Co., 401 U.S. 424 (1971).....9, 19, 24, 39, 48, 76, ...77, 78, 79, 83, 89, 91

Griggs v. Duke Power Co., 420 F.2d 1225 (1969), rev'd 401 U.S. 424 (1971)..... .....88, 119

Guerra v. Manchester Terminal Corp., 498 F.2d 641 (5th Cir. 1974).....104

Hairston v. McLean Trucking Co., 520 F.2d 226 (4th Cir. 1975).....71

Hall v. Werthan Bag Co., 251 F.Supp. 184 (M.D. Tenn. 1966).....38

Huff v. N.D. Cass Co., 485 F.2d 710 (5th Cir. en banc 1973).....44

James v. United States, 366 U.S. 213 (1961).....36

Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968).....38, 39, 63

Jimenez v. Weinberger, 523 F.2d 689 (7th Cir. 1975)..... 30,34

Johnson v. Georgia Highway Express, Inc. 417 F.2d 1122 (5th Cir. 1969).....38

Johnson v. Georgia Highway Express, Inc. 488 F.2d 714 (5th Cir. 1974).....63

Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974).....99

Jones v. Lee Way Motor Freight, 431 F.2d 245 (10th Cir. 1971), cert. denied 401 U.S. 954 (1971).....57, 63, 80, 83, 84

Kaplan v. Int'l Ass'n of Theatrical and Stage Employees, 525 F.2d 1354 (9th Cir. 1975).....57

Linkletter v. Walker, 381 U.S. 618 (1965).....36

Local 12, United Rubber Workers v. N.L.R.B., 368 F.2d 12 (5th Cir. 1966), cert. denied 389 U.S. 837 (1967).....104

Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), cert. denied 397 U.S. 919 (1970).....86, 87, 90

Macklin v. Spector Freight System, Inc. 478 F.2d 979 (D.C. Cir. 1973).....100

Marquez v. Omaha Sales Division, Ford Motor Co., 440 F.2d 1157 (8th Cir. 1971).....59

McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973)..23, 48, 49, 50, 53, 54, 58, 108, 113

Moody v. Albemarle Paper Co., 474 F.2d 134 (4th Cir. 1973), vac'd and rem'd 422 U.S. 405 (1975).....87, 88

Muller v. United States Steel Corp., 509 F.2d 923 (10th Cir. 1975).....57, 115

N.L.R.B. v. Wooster Division of Borg-Warner Corp., 356 U.S. 342 (1958).....104

Oatis v. Crown Zellerbach Co., 398 F.2d 496 (5th Cir. 1968).....38, 39

Parham v. Southwestern Bell Tel. & Tel. Co., 433 F.2d 421 (8th Cir. 1970).....57

Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir. 1976).....86, 100

Quarles v. Philip Morris, Inc., 279 F.Supp. 505 (E.D. Va. 1968)..86,87,88, 90

Reed v. Arlington Hotel Co., Inc., 476 F.2d 721 (8th Cir. 1973).....38,57

Rich v. Martin Marietta Corp., 522 F.2d 333 (10th Cir. 1975).....39, 44

Robinson v. Lorilland Corp., 444 F.2d 791 (4th Cir. 1971), cert. dismissed 404 U.S. 1006 (1971).....89, 105, 107

Rodriguez v. East Texas Motor Freight, 505 F.2d 40 (5th Cir. 1975), cert. granted 48 L.Ed. 2d 814 (1976) passim

Rogers v. International Paper Co., 510 F.2d 1340 (8th Cir. 1975) vac'd and rem'd on other gounds, 46 L.Ed.2d 29 (1975).....59

Sabala v. Western Gillette Co., 516 F.2d 1251 (5th Cir. 1975).....80

Sagers v. Yellow Freight System, Inc., 529 F.2d 721 (5th Cir. 1976)..... .....71, 80, 83, 84, 91, 98

Sagers v. Yellow Freight System, Inc., 58 F.R.D. 54 (N.D. Ga. 1972), 388 F. Supp. 507 (N.D. Ga. 1973), aff'd 529 F.2d 721 (5th Cir. 1976).....46

Senter v. General Motors Corp. 532 F.2d 511 (6th Cir. 1976).....34, 38,57

Steele v. Louisville & Nashville R. Co., 323 U.S. 192 (1944).....100

Swint v. Pullman-Standard Co., 539 F.2d 77 (5th Cir. 1976).....91

Taylor v. Armco, 429 F.2d 498 (5th Cir. 1970).....90

Taylor v. Safeway Stores, Inc., 524 F.2d 263 (10th Cir. 1975).....57

Thornton v. East Texas Motor Freight, 497 F.2d 416 (6th Cir. 1974)...80, 83,101

Turner v. Fouche, 396 U.S. 346 (1970).....56

United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826 (5th Cir. 1975), cert. denied 48 L.Ed. 2d 187 (1976)....46

United States v. Bethlehem Steel Corp., 312 F.Supp. 977 (W.D. N.Y. 1970), aff'd in pert. part 446 F.2d 652 (2nd Cir. 1971).....54

United States v. Bethlehem Steel Corp., 446 F.2d 652 (2nd Cir. 1971).....87,106

United States v. Chesapeake & Ohio Rwy. Co., 471 F.2d 582 (4th Cir. 1973) cert. denied 411 U.S. 939 (1973).....90

United States v. East Texas Motor Freight, 10 EPD ¶10,345 (N.D. Tex. 1975)..... .....5, 12, 13, 46, 61, 63, 79, 118

United States v. Hayes International Corp., 456 F.2d 112 (5th Cir. 1972).....57, 58

United States v. Hinds County Bd. of Ed., 417 F.2d 852 (5th Cir. 1969).....60

United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir. 1971), cert. denied 404 U.S. 984 (1971).....57

United States v. Jacksonville Terminal Co. 451 F.2d 418 (5th Cir. 1971), cert. denied 406 U.S. 906 (1972).....19, 88, 90

United States v. Lee Way Motor Freight, 7 EPD ¶9066 (W.D. Okla. 1973)...47, 63, 84

United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969)....54, 57, 71

United States v. Navajo Freight Lines, 525 F.2d 1318 (9th Cir. 1975)...47, 80, 98

United States v. T.I.M.E.-D.C., Inc., 517 F.2d 299 (5th Cir. 1975) cert. granted 44 LW 3669 (May 24, 1976)...46, 52, 60, 63

United States v. Terminal Transport Co., 11 EPD ¶10,704 (N.D. Ga. 1976).....34

United States v. Trucking Employers, Inc., 12 EPD ¶11,162 (D. D.C. 1975).....48

United States (Ford) v. United States Steel Corp., 520 F.2d 1043 (5th Cir. 1975), cert. denied.—U.S.— (Oct. 4, 1976)..52,88

United Transportation Union, Local Union No. 974 (Rock) v. Norfolk & Western Railway Co., 532 F.2d 336 (4th Cir. 1975), cert. denied, 48 L.Ed. 2d 175 (1976)...99

Watkins v. Scott Paper Co., 530 F.2d 1159 (5th Cir. 1976), cert. denied ___U.S.___ (October 4, 1976).....78, 119

Whitfield v. United Steel Workers of America, 263 F.2d 546 (5th Cir. 1959), cert. denied 360 U.S. 902 (1959).....90

Williamson v. Bethlehem Steel Corp., 468 F.2d 1201 (2nd Cir. 1972), cert. denied, 411 U.S. 931 (1973).....46

Young v. Edgcomb Steel Co., 499 F.2d 97 (4th Cir. 1974).....115

Statutes

National Labor Relations Act, 29 U.S.C. §§151 et. seq.....102, 103, 104, 105, 106

42 U.S.C. §1981.....2, 21, 27

Title VII, Civil Rights Act of 1964, 42 U.S.C. §§2000(e) et seq.....passim

42 U.S.C. §2000e-2.....
42 U.S.C. §2000e-2(a).....
42 U.S.C. §2000e-2(c)(2).....109
42 U.S.C. §2000e-2(h).....24,86,86, 92
42 U.S.C. §2000e-5(a).....108
42 U.S.C. §2000e-5(d).....39
42 U.S.C. §2000e-5(e).....108
42 U.S.C. §2000e-5(f).....40
42 U.S.C. §2000e-5(f)(1).....40
42 U.S.C. §2000e-5(g).....41

Rules and Regulations

E.E.O.C. Guidelines or Employee Selection Procedures, 29 C.F.R. §1607.11 (1970).....118

Executive Order 11246, 3 C.F.R. 339 (1965).....4

Federal Rules of Civil Procedure, Rule 23.....29, 30, 36, 37, 40, 42, 50

Federal Rules of Civil Procedure, Rule 23(a).....22, 42

Federal Rules of Civil Procedure, Rule 23(a)(1).....42

Federal Rules of Civil Procedure, Rule 23(a)(2).....42

Federal Rules of Civil Procedure, Rule 23(a)(3).....43, 44

Federal Rules of Civil Procedure, Rule 23 (a)(4).....36, 44

Federal Rules of Civil Procedure, Rule 23(b)(2).....22, 34, 42, 51

Federal Rules of Civil Procedure, Rule 23 (c)(1).....27, 33, 34, 35, 36

Federal Rules of Civil Procedure, Rule 23(c)(4).....45

Federal Rules of Civil Procedure, Rule 23(d)(2).....45

Federal Rules of Civil Procedure, Rule 23(e).....46

Legislative History and Other Materials

Advisory Committee Note to Rule 23, 39 F.R.D. 69 (1966).....33, 42, 51

118 Congressional Record 4942 (1972).....41

118 Congressional Record 7168 (1972).....41

118 Congressional Record 7170 (1972).....41

Cooper & Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 HARV.L.REV. 1598 (1969).....88

Note, Title VII, Seniority Discrimination and the Incumbent Negro, 80 HARV.L.REV. 1260 (1967).....88

Senate Rep. 415, 92d Cong., 1st Session (1971).....39

United States Department of Commerce, Bureau of the Census, 1970 Census of Population Vol. 1, Part 45 (Texas)...66, 68, 108, 112

7 Wright and Miller, Federal Practice and Procedure: Civil (1972).....51

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

Nos. 75-651, 75-715 and 75-718
(Consolidated)

No. 75-651

TEAMSTERS LOCAL UNION 657,

vs. Petitioner,

JESSE RODRIGUEZ, et al., Respondents.

No. 75-715

SOUTHERN CONFERENCE OF TEAMSTERS,

vs. Petitioner,

JESSE RODRIGUEZ, et al., Respondents.

No. 75-718

EAST TEXAS MOTOR FREIGHT SYSTEM, INC.,

vs. Petitioner,

JESSE RODRIGUEZ, et al., Respondents.

BRIEF FOR RESPONDENTS

QUESTIONS PRESENTED

1. Where the parties tried this case as a Title VII class action and the record contains evidence meeting the requirements of Rule 23, did the district court err in dismissing the class action?

2. Did respondents' evidence, including statistical proof of segregated hiring and other exclusionary patterns-and-practices, make out a prima facie case of class-wide discrimination in initial hiring and assignment under appropriate standards?

3. Are petitioners' restrictive no-transfer rules and dual seniority system, which prevent minority employees from obtaining the road driver positions which they seek, unlawful under Title VII and 42 U.S.C. §1981?

4. Are the union petitioners liable for having violated Title VII and 42 U.S.C. §1981 by participating in collective bargaining agreements which contain terms that perpetuate past discrimination and "lock in"

minority city drivers?

5. Did the district court err in dismissing the respondents' individual discrimination claims based on its own evaluation of qualifications even though petitioner company had never considered those qualifications?

COUNTER-STATEMENT OF FACTS

A. Introduction to the Case.

Because of omissions and inaccuracies in the Statement of Facts in petitioners' briefs, respondents find it necessary to make this Counter-Statement of Facts.

This is a class action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e et seq., brought by a group of Mexican American workers (respondents here, plaintiffs below) against their employer, East Texas Motor Freight (ETMF), an interstate trucking company, and their union representatives, the Southern Conference of Teamsters and Teamsters Local 657 (petitioners). This action was filed December 26, 1971 in the Western District of Texas.[1/] This

1/ On June 29, 1972, the United States

suit grew out of written charges filed by the plaintiffs with the Equal Employment Opportunity Commission, complaining that the policies of ETMF, the Southern Conference of Teamsters and Teamsters Local 657 discriminated against Mexican Americans and Blacks by relegating them to the less lucrative city driver jobs and excluding them from road driver jobs. Plaintiffs received "right to sue" letters in October 1971 and shortly thereafter filed this class action suit.

The plaintiffs complained about petitioners' discriminatory policies which discourage and prevent transfer from city to road jobs, regardless of qualification. The policies, briefly stated, are ETMF's no-transfer rules, which bar inter-terminal

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also filed suit against the ETMF system and the International Brotherhood of Teamsters in the Northern District of Texas, alleging that the defendants were engaged in a pattern and practice of discrimination in employment in violation of Title VII and Executive Order 11246, 3 C.F.R. 339 (1965), N.D. Tex. Civ. No. 3-6025-B. The government's suit resulted in a partial consent decree between the United States and ETMF (App. 424-443). The Fifth Circuit correctly held that this consent decree, which did not cover many members of the class in the instant action, did not bar these proceedings

transfers and require that city drivers resign their city jobs before applying for road jobs, and the rule (sanctioned and required by the separate agreements negotiated by the Southern Conference of Teamsters and ETMF for city and road jobs) preventing city drivers from carrying their seniority to road driver jobs.

B. The Facts.

The road and city driver workforces at ETMF's Texas terminals reflect a pattern of pervasive discrimination. Mexican Americans and Blacks have been totally excluded from road positions. The assertion of the Southern Conference that "...the makeup of city employees at terminals across the state of Texas generally reflected the racial-national origin makeup of the respective communities in which the terminals were located" (Southern Conf. Br. 8) is not supported by the record cite or the facts. ETMF employs in-city

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(505 F.2d at 65-66, App. 108-111). The government's case proceeded to trial against the union defendants. After trial, the district court found that ETMF and the Teamsters had discriminated against Black and Mexican American city drivers, and granted relief against the unions, 10 EPD ¶10,345 (N.D. Tex. 1975).

drivers at 20 of its 21 terminals within the state of Texas but inter-city road drivers are domiciled at only 6 of these terminals (ETMF Br. 6).[2/] The employment statistics for the two jobs show a segregated pattern of racial/ethnic staffing. Overall, as of March 1972, ETMF employed 544 city drivers in Texas; of these, 102 (19%) were Spanish-surnamed, 95 (17%) Black, and 347 (64%) were Anglo (App. 315-16). But of approximately 183 road drivers, all but 3 (1.6%) were Anglo, and none was Black (App. 315).

The three Mexican American road drivers were all hired after plaintiff Rodriguez had filed his EEOC charge in 1971 (App. 113-4).[3/] Prior to that filing, ETMF stipulated the company had never employed a Mexican American or Black road driver in the Southern Conference in Texas (App. 56). In the Southern Conference area, including several other states in addition to Texas, ETMF employed 415 road drivers as of May 1971—all Anglos

2/ The terminals with road drivers are Dallas, El Paso, Longview, San Angelo, and Texarkana (Pl. Ex. 21, App. 352 ff.).

3/ Significantly, although domiciled at El Paso, they did not drive in Texas; they were assigned to runs west of El Paso in the

(App. 322).[4/]

The individual terminal statistics are revealing. The racial/ethnic composition of the drivers at various terminals with both city and road drivers as of February 1972 is shown in tabular form:

Terminal	City Drivers			Road Drivers		
	SSA	B	W	SSA	B	W
Dallas[5/]	11	5	107	0	0	59
El Paso	22	1	0	3	0	52[6/]
Longview	0	1	27	0	0	32
San Angelo	0	1	18	0	0	32
Texarkana	0	0	9	0	0	5

Source: Pl. Ex. 21 (App. 352-415)[7/]

Western Conference area (App. 239, 306-07).

4/ ETMF stipulated in the government's pattern-and-practice suit that as late as June 1972 the company had no Black road drivers anywhere (App. 445) and employed only 8 Mexican American road drivers among its approximately 800 total road drivers (id). Of these 8, ETMF had hired only 3 (those employed in 1971 in El Paso); it "acquired" the other 5 in a merger (id.).

5/ City driver figures for Dallas, which are not shown on Pl. Ex. 21 as reprinted in the Appendix, are reported as of July 1971 from Pl. Ex. 1 (App. 322).

6/ Includes two Native Americans.

7/ The other terminal at which road drivers

At the Fort Worth terminal (no road drivers domiciled) all 35 city drivers were Anglo (App. 379-80), whereas at Houston of 157 city drivers 110 were minorities—37 Spanish-surnamed and 73 Black (App. 385-91). At San Antonio (one road driver domiciled at one time) 41 of 47 city drivers were minorities—32 Spanish-surnamed and 9 Blacks (App. 408-10). Thus, the only ETMF terminals throughout Texas where more than a token few minority persons held city driver jobs were in San Antonio, El Paso and Houston, where nearly all or the great majority of city drivers were minorities, and Dallas, where about 13% were. All three minority road drivers drove west from El Paso; the road driver contingent throughout the rest of the state remained lily-white to the time of trial.

In summary, the terminal-by-terminal, statewide, and Southern Conference employment figures make it crystal-clear that race was a constant and pervasive factor in staffing ETMF's truck driver jobs. In many ter-

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were domiciled, Pecos, had no city drivers; its 16 road drivers were all white (App. 404).

minals, Mexican Americans and Blacks were simply not hired as drivers; in several others, they were considered for city driver jobs along with whites, but not for road positions. In El Paso, virtually all city drivers were Mexican Americans, but road driver jobs were reserved for Anglos.[8/]

C. Facts Showing Discrimination, Regardless of Definition Applied.

Whether discrimination is given its old-fashioned definition of different treatment of different groups of people based on proscribed factors or, consistent with this Court's definition in Griggs v. Duke Power Co., 401 U.S. 424 (1971), its newer definition of similar treatment having a disparate effect, the record shows discrimination in this case.

1. Griggs-type discrimination: similar treatment of different groups.

ETMF and the unions have maintained road driver positions in a separate status from local terminal jobs, including city driver. Road jobs are covered by separate

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8/ The same pattern of segregated hiring formerly prevailed at Houston, where most city drivers are Mexican American or Black. Houston was a road driver domicile until 1965 (App. 310).

collective bargaining agreements between the petitioners, and consequently seniority accrued in city or local jobs is not usable or transferable to road positions (App. 175-76). To compound the effects of the separate seniority units, ETMF prohibits transfer from city to road driver positions (App. 227-28). ETMF modified this policy for a one-month period in 1972, but only to give transfer rights to city drivers at road driver domicile terminals—almost all of whom are Anglos (App. 228-29). In addition, ETMF's no-transfer policy precludes transfers between different terminals, regardless of what job or jobs are involved (App. 187-88, 310).[9/] As a result, persons initially hired as city drivers are effectively precluded from later becoming road drivers—unless they are willing to resign their city employment, forfeit their accrued seniority, and start over (if hired) as a new road driver at the bottom of the seniority list. ETMF's vice president for industrial relations readily agreed that this system "did have the effect of locking

9/ ETMF has deviated from this rule at least in allowing inter-terminal bumping, by road drivers only, during periods of layoffs, under the "modified seniority system" (App. 343, 346, 230).

in all city drivers into city positions" (App. 231). Indeed, ETMF acknowledges that this lock-in effect was the main purpose of the no-transfer rule (Br. 6-7). Since the seniority/transfer system effectively screens out city drivers from road positions, it operates as an employee selection standard. The adverse impact of this standard falls most heavily on Mexican Americans and Blacks.

2. Old-fashioned discrimination: different treatment of different groups of people based on proscribed differences.

However, whether one uses the Griggs definition of discrimination or not, clearly there is plain old-fashioned discrimination here.

Contrary to the allegations of ETMF that it applies equally its "facially neutral" driving standards, ETMF has often treated its minority and Anglo employees differently by not requiring all Anglo drivers to meet those standards. In the government's suit, the Court found as a fact that: "ETMF did not strictly comply with stated company hiring standards through the years when hiring drivers for over-the-road jobs. Deviations may be found from every standard regarding age,

education, safety record, and driving experience." 10 EPD ¶10,345 at p. 5416.[10] The instant record contains similar evidence, see App. 181.

ETMF claims that each terminal operates as a separate hiring center (Br. at 6, 33). While this may be the case as to many city employees, it is emphatically not true of hiring for road drivers. Corporate headquarters in Dallas are deeply involved in hiring road drivers for the entire ETMF system, and maintain "very tight corporate control" of such hiring (App. 181).

The hiring process is commenced when a transportation officer—presumably upon advice or request from a terminal—makes known to the safety department in Dallas a need to hire additional road drivers (App. 227). Safety supervisors reporting to the director of safety review applications, pass on applicants' qualifications, and even ride in the cab while giving applicants road tests (App. 301-02, 312-13). Local terminal managers can

10/ The record in United States v. ETMF reveals dozens of instances in which ETMF hired road drivers who did not meet the age, weight, education or experience requirements allegedly "required" by the company (see p. 62, ¶ iv, infra).

refer or recommend applicants, but the hiring decision and process remain centralized[11] (App. 226-227). When city drivers seek transfer to road jobs, terminal personnel cannot pass on their requests, but refer them to Dallas; alternatively, the transfer request could be made directly to the central office (App. 141, 312-13). Thus, the officials who have charge of processing road driver applications and deciding whether and where to place road drivers are the same central office personnel who also have complete knowledge as to where vacancies exist in the ETMF system.

In addition to referrals from local terminals where applications for road positions may be filed, the Dallas headquarters also receives referrals from outside sources. The company has "traditionally" relied on Teamster unions as a source of job applicants (App. 315.)[12] A high company of-

11/ Both the director of safety and the vice president for industrial relations emphasized that local terminals managers' authority to hire road drivers is far more circumscribed than their power to hire city drivers or other local personnel (App. 227, 302).

12/ In the Consent Decree negotiated in the United States v. ETMF proceeding, the

ficial also testified that ETMF relied heavily on referrals by incumbent employees as a source of applicants (App. 186).[13] He also stated that ETMF would not take applications except when it had vacancies (App. 187), thereby increasing the importance of inside information for persons referred to the company.

D. The Individual Claims.

All named plaintiffs, Jesse Rodriguez, Sadrach Perez, and Modesto Herrera, were initially employed as city drivers in the San Antonio terminal at least six years prior to this suit (App. 124, 134-5, 270). Each orally inquired about road driver positions and the possibility of transfer to road jobs on many occasions (App. 119-20, 239-40, 244, 290-1). They expressed willingness to transfer, even if they had to lose their seniority

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practice of the unions' referring of applicants to ETMF was sanctioned: "When ETMF needs additional employees, it shall give the applicable local union equal oportunity along with other sources to provide suitable applicants if it has a referral hall, but ETMF shall not be required to hire those referred by the local union unless mandated by applicable union contract. App. 429-30 [emphasis added].

13/ At road driver domicile terminals, these incumbents are heavily Anglo.

and move to another city (App. 268-9, 275, 284, 299; Tr. 64, 66, 67). Other class members including Trinidad Gomez, Lupe Morales and Andrew Hernandez also expressed similar interests to union and company officials as well (App. 130-3, 159, 265-6, 314). Finally, in late 1970, all named plaintiffs and Trinidad Gomez made written application for transfer to road jobs (App. 324-7). However, plaintiffs' applications were not submitted to the Dallas office until after charges had been filed by plaintiffs with the EEOC (App. 56-7).

Plaintiffs got little, if any, response from union officials or company representatives regarding either the oral or written applications. In fact, plaintiffs were even met with derogatory comments about Mexican Americans.

Thus, Dick Truitt, ETMF's Terminal Agent, told Mr. Perez that road jobs were not for Mexican Americans; that the equipment was too expensive for Mexican Americans to be driving it (App. 240, 241). Mr. Truitt concluded with the remark, "...we try. We treat you people nice here." (App. 241) The response of Ray Shafer, the union represen-

tative, was equally blunt. Mr. Perez had learned from Wes Sager, ETMF's Terminal Manager, that there were road openings in San Angelo and sought Sager's assistance in securing one of those jobs (App. 252). Shafer's response was to call Everett Cloer, ETMF's Vice President in charge of industrial relations (App. 71, 225), and Sager's superior and tell Cloer to tell Wes Sager to quit giving out "this type of information" (App. 252-53). The response to Mr. Rodriguez' application came from Mr. Beierle, the Assistant Terminal Manager for ETMF, and Mr. Shafer. Mr. Bierle told him that ETMF had a policy of prohibiting city drivers to transfer to road positions (App. 270-71). Shafer also mentioned the no-transfer policy, adding that he could not tell the companies whom to hire (App. 274). Mr. Rodriguez, however, was less than persuaded since he had read in the company magazine about a white city driver working for ETMF who had transferred to a road driver's job (App. 277-78).

Mr. Herrera got similar responses from Ed Asbury, ETMF's Terminal Manager, who told Herrera that he did not qualify (App. 290-91) and later that the no-transfer policy

precluded such a move.

The response to the written applications for road positions was even more worrisome: they were filed, and only much later forwarded to the main office in Dallas for consideration on the merits (App. 418).

Although the district court found defendants' actions toward plaintiffs was justified because they allegedly failed to meet the job qualifications (App. 60), the facts show that other Anglos were hired subsequent to the date of plaintiffs' applications who similarly failed to qualify for road jobs, based on a literal reading of those qualifications (App. 181). However, as an ETMF official testified, plaintiffs' applications and qualifications were not even considered, even after they were finally submitted to the Dallas office, because the no-transfer policy would have precluded their consideration for those jobs (App. 190-1). Thus the company never passed on plaintiffs' qualifications.

E. Decisions of the Courts Below.

A non-jury trial was held on January 29 and 30, 1973, and on March 22, 1974 Judge Wood filed his findings of fact and conclu-

sions of law (App. 56-57); judgment for defendants (App. 67) was entered on the same day. The district judge found that the cause of action was inappropriate for class action treatment and that none of the defendants had violated either Title VII or §1981 in any respect. The district judge's findings and remarks during the course of trial show that he equated the determination of illegality with a finding of blatant racial discrimination appearing on the face of defendants' actions, as opposed to an unjustified discriminatory effect of facially neutral practices.[14/]

14/ Thus, the district court relied on the mere existence of facially neutral facts to support its no-discrimination result: e.g.,the facts that the union contract provisions prohibiting transfer applied "to all job applicants and employees regardless of race or qualifications"(Finding of Fact No. 11 [App. 59]);that a good portion of those hired as city drivers were Mexican American and Black (Finding of Fact No. 14 [App. 59]); and that the local union is comprised of a majority of Mexican American and Black members (Finding of Fact No. 17 [App. 59]). Consistent with this orientation, in his questioning of the witnesses Judge Wood kept trying to find "prejudice". He asked one of the plaintiffs' Chicano witnesses whether, "[i]n the course of any of these conversations with...the people in charge, the em-

Respondents filed a timely notice of appeal on May 3, 1973. On November 24, 1974, the Court of Appeals for the Fifth Circuit, speaking through Judge Wisdom, rendered its decision reversing the judgment of the district court. The Court of Appeals held:

(i) The district court erred in dismissing the class action (505 F.2d at 49-52;

ployees, your co-workers or with the union itself, was any of this motivated by prejudice against you or any of the other men or employees because of their race, because they were Mexican Americans or Black?" (App.133)

Also, in questioning ETMF's President, H.L. Johnson, Judge Wood asked if Anglos are "treated just exactly like the Mexican Americans" in that they, too, would lose seniority if they transfer from city to road (App. 174-5). Again, in a colloquy with counsel the Judge pointed out and stressed that the no-transfer policy "is done irrespective of race or national origin..."and "that's the thing that's troubling the Court" (App.198). See also App. 199-200.

As these illustrations show, the trial court ignored the correct legal standard for defining discrimination. Discrimination is not only different treatment of different groups of people, based on proscribed differences, but also like treatment having a discriminatory effect and not required by "business necessity". Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971); United States v. Jacksonville Terminal Co., 451 F.2d 418, 451 (5th Cir. 1971), cert. denied, 406 U.S. 906 (1972).

App. 76-83).[15/]

(ii) The district court erred in failing to find that plaintiffs had made out an unrebutted prima facie case of discrimination (505 F.2d at 53-59).[16/]

15/ In so holding, the Fifth Circuit expressly rejected the district court's assertion that plaintiffs had presented "no proof" of class-wide discrimination; the appellate court noted the "overpowering" statistical evidence and proof of the separate seniority and no-transfer policies. The Fifth Circuit also noted that the pretrial stipulation, that "the only issue presently before the Court...is whether the failure of the defendant, East Texas Motor Freight, to consider Plaintiffs' line driver applications constituted a violation of Title VII and 42 U.S.C. §1981", was entered in an attempt to eliminate confusion in exposition of evidence at trial, not to foreclose the class issues, and that this was made clear at trial to defendants and the trial court.

16/ In reaching this holding, the Fifth Circuit recognized both the great weight to be given to such strong statistical evidence as appears here, and the familiar lock-out pattern characterizing ETMF's seniority and transfer policies. It found that such policies "although neutral on their face, tend to preserve or continue the effects of past discriminatory [hiring] practices" which had restricted minority dirvers to city positions. For this reason, the appellate court correctly refused to give plaintiffs' stipulation that the named plaintiffs were not discriminated against when they were hired

(iii) Although the union defendants had no responsibility for hiring, nevertheless both Local 657 and the Southern Conference of Teamsters had violated Title VII and §1981 by participating in the establishment and maintenance of the separate seniority unit system under the collective bargaining agreements (505 F.2d at 60-61; App. 97-101).[17/]

(iv) For its remedy, the Court of Appeals directed the district court to grant class members who could qualify under legitimate qualification standards an opportunity to transfer to road driver jobs with carryover seniority sufficient to restore them to their "rightful place" positions. It also directed the trial court to consider back pay awards under proper standards (505 F.2d at 61-64; App. 101-08).

(v) The Court of Appeals held the district court's finding, that all three named

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as city drivers at the San Antonio terminal (App. 417) the broad reading that defendants urged.

17/ The Fifth Circuit reasoned that the unions were parties to the collective bargaining agreements despite their awareness of the lock-out effect of the seniority system established therein.

plaintiffs were unqualified, to be "premature", since ETMF admittedly never considered plaintiffs' applications on their merits. The Fifth Circuit remanded the issue for determination under correct standards (505 F.2d at 63; App. 104).

Petitions for certiorari to review this judgment were filed by all defendants. This Court granted them on May 24, 1976.

SUMMARY OF ARGUMENT

I. The district court erred in dismissing the class action. ETMF's contention that it had no notice that plaintiffs were pursuing the class action is inconsistent with the plaintiffs' clear statements to the contrary and with ETMF's own trial defense, which concentrated on the class allegations. Dismissal for failure to pursue the class action was therefore error. Nor does the failure to move to certify the class action justify dismissal, since no party was prejudiced thereby. Plaintiffs' evidence satisfied all the requirements of Rule 23(a) and (b)(2), Fed. R. Civ. P., for maintaining this case as a class action of the type that Congress and the courts have endorsed. The class action defined by the

Fifth Circuit is appropriate, and may be refined by use of appropriate orders in conduct of the class action on remand.

II. Standards of prima facie proof for Title VII class actions like this one are different from those announced in McDonnell-Douglas Corp v. Green, 411 U.S. 792 (1973), for individual claims. Statistical patterns and systemic evidence of discrimination are highly probative and shift the burden of explanation to defendants, even in the absence of detailed proof as to individual class members. The record contains extensive evidence of systemic discrimination practices in addition to glaring statistical disparities in the hiring of whites and minorities for both city driver and road driver positions across Texas. The reasons ETMF advances to explain the exclusion of minorities from road driver jobs are unpersuasive. The Court should hold that plaintiffs proved a prima facie case of class-wide discrimination.

III. ETMF's no-transfer rules lock out virtually all its Mexican American and Black employees, who are city drivers, from road driver positions. No "business necessity" requires these rules. They are therefore

unlawful, both as restrictions which perpetuate the effects of past hiring discrimination and as selection standards which fall under the rule of Griggs v. Duke Power Co., 401 U.S. 424 (1971). Defendants' dual seniority system also perpetuates the exclusion of minority drivers from road positions. This discriminatory seniority system is not a bona fide seniority system within the meaning of §703(h) of Title VII. None of the factors the union defendants rely on to argue that system's bona fides detracts from the conclusion that it is unlawful.

IV. Both union defendants refused to help their minority city driver members obtain their rightful opportunity to seek and gain road driver jobs. Both unions must therefore share in liability for the discriminatory effects of the dual seniority system and other restrictive practices. Unions have an affirmative obligation to seek equal employment opportunities for all workers. The unions' actions and omissions in this case fall short of that standard. None of reasons advanced by the unions - the separate obligations imposed by the National Labor Relations Act, the purported preferences of

union members, and other factors - justifies the unions' practices or excuses them from liability.

V. Although it is clear that ETMF never considered the Mexican American plaintiffs' qualifications for road jobs, at trial, over plaintiffs' strenuous objections, the district court erred in permitting ETMF to defend the case on the basis that plaintiffs were poorly qualified, and in dismissing the individual claims based on its own evaluation of the qualifications. The Fifth Circuit correctly reversed the district court's dismissal of the individual claims, in keeping with the correct legal standards. Assuming arguendo that the district court could properly have reviewed plaintiffs' qualifications as road drivers, the district court committed error by applying ETMF's paper standards. Those alleged standards were purely theoretical, for ETMF did not adhere to them in hiring Anglo road drivers. An employer may not require minority applicants to meet higher or different qualifications from those required of similarly situated whites. The district court committed clear error in adopting ETMF's unequally applied paper standards as guidelines for its decision.

ARGUMENT

I. THIS CASE IS MAINTAINABLE AS A CLASS ACTION, AS THE COURT OF APPEALS HELD. THE DISTRICT COURT ERRED IN DISMISSING THE CLASS ACTION.

A. Introduction.

The positions argued in ETMF's brief on the merits[18/] differ substantially from those framed as Questions Presented, on which certiorari was granted. The thrust of ETMF's petition was that the Fifth Circuit's class action ruling had deprived petitioners of a chance to argue the question of class certification (ETMF Pet. 10-22). In its brief, ETMF repeats that contention (Br. 13-16), but also argues that the Fifth Circuit's ruling prejudiced its defense on the merits of the class action (ETMF Br. 18-29) and that the case was not a proper class action (ETMF Br. 29-36).[19/] Although ETMF earlier argued that

18/ The union petitioners have deferred to ETMF's discussion of class action issues, but adopt ETMF's position. See Southern Conference Petition p. 11 n. 10 and Br. 2 n.2.

19/ ETMF also extensively argues another issue related only to the merits of the class claim—the standard of proof issue (see argument II, infra), ETMF Br. 37-55.

the Court of Appeals should not have decided the merits of the class action, it now seeks to have this Court decide those merits in its favor. Respondents are therefore compelled to reply both to the due process question initially presented and to the Rule 23 issue as to the propriety of this case as a class action.

B. Class Action Proceedings Below.

Plaintiffs filed this suit as a class action (App. 7-8); defendants denied this allegation (App. 20, 25, 28-32). At the time of trial, no party had moved for a certification of the class pursuant to Rule 23(c)(1), Fed. R. Civ. P. Defendants rely on a pre-trial stipulation (App. 115 ¶8) to argue that plaintiffs had abandoned the class action, but on its face the stipulation does not support that claim.[20/] In the pre-trial order

20/ The stipulation was limited to defining issues "pertaining to the company" (App. 115). The determination of the issue specified for trial—"whether the [ETMF] failure...to consider plaintiff's [sic] line driver applications constituted a violation of Title VII and 42 U.S.C. §1981 (id.)—would necessarily require determination of the class-wide issues as to the no-transfer rule and lock-in seniority system.

filed and entered on the day trial started (App. 4) plaintiffs unambiguously showed that they were pursuing their class action: their outline of the case includes several pages of contentions and prayers for relief that can only be construed as directed to the class on a pattern-and-practice theory.[21/] Moreover, the pre-trial order recites explicitly at p. 3:

> By way of relief, plaintiffs have requested that this Court allow the instant proceeding to proceed as a class action on behalf of those Mexican American and black city drivers and applicants within that part of the State of Texas covered by the Southern Conference collective bargaining agreement...Plaintiffs request that they and members of their class be awarded all back pay lost due to the discriminatory conditions engaged in by defendants.

Early in the trial, in colloquy quoted by the Fifth Circuit (505 F.2d at 52 n. 14; App. 82-83 n. 14), plaintiffs' counsel reiterated their intention to proceed with the class action. In reply the District Judge

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21/ See plaintiffs' proposed pre-trial order (not reproduced in appendix), pp.3-6.

stated that he would "leave that open"(App. 130). After trial in which the parties introduced extensive evidence pertinent to the class action issue, see p.31, infra, the district court dismissed the class action without reviewing the evidence showing that plaintiffs had fulfilled the requirements of Rule 23 (App. 66). The district court simply asserted that plaintiffs had offered "no credible proof" going to the existence of a class or of "liability or damages as to any class" (App. 65), and dismissed the class action as "not a proper one" (App. 66). This was respondents' first notice that the court was prepared to make its final class determination at that time.

The Fifth Circuit approached the class action question on appeal with the express understanding that Rule 23 standards applied and that plaintiffs had the burden of satisfying them (505 F.2d at 50; App. 78).[22/] The Fifth Circuit reversed the district court's sudden dismissal of the class action and expressly rejected the reasons given by the

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22/ ETMF's rhetorical assertion that the Court of Appeals "exempted the plaintiffs from the requirements of Rule 23" (Br. 29) is unsubstantiated.

lower court and petitioners for the dismissal (505 F.2d at 50-51; App. 79-81). In addition—and, we submit separately from an analytical standpoint[23/]—the Fifth Circuit reviewed the evidence and determined that Rule 23 requirements had been met (505 F.2d at 51-52; App. 81-83). It also defined the proper scope of the class (id.).

C. Petitioners Had Adequate Opportunity To Present Their Evidence on the Merits of the Class Action Claims and Did So.

ETMF's petition for certiorari opined that petitioners had no chance to defend against the class claims. It appeared to seek merely a chance to present evidence. Its brief on the merits no longer stresses this argument. Instead, it contends that the evidence does permit review of the class determination issues, that the class action is not maintainable, and that no discrimination was shown.

ETMF's due process argument is based on the premise that it had no fair opportunity to defeat the class action. This premise is faulty. Petitioners had repeated notice at

23/ Cf. Jimenez v. Weinberger, 523 F.2d 689, 699 n. 22 (7th Cir. 1975) (Stevens, J.).

and before trial that plaintiffs intended to seek class representative status, see p.28, supra. In fact, all parties tried this case as a class action.[24/] Defendants' witnesses gave lengthy testimony about the history and structure of collective bargaining in the Southern Conference and nationwide,[25/] the provisions of collective bargaining agreements past and present across the country,[26/] ETMF's application and hiring procedures,[27/] the origin and purported business necessity for the no-transfer rules on a company-wide basis,[28/] the justification for purported terminal-based hiring responsibility on a company-wide basis,[29/] the history of ETMF's

24/ ETMF's contention that it concentrated on the named plaintiffs' qualifications is not borne out by the record of trial. See nn. 25-31, infra, and accompanying text. The testimony cited in those footnotes is only a part of what the original record contains.

25/ See, e.g., App. 143, 205-12, 214, 230-1, 308.

26/ See, e.g., App. 145-8, 152-6, 215-9, 220-4, 231.

27/ See, e.g., App. 140-1, 171-2, 176-81, 186-7, 225-7, 233-4, 301-2, 312-3.

28/ See, e.g., App. 162-8, 172-6, 188-9, 227-9, 232, 202-6.

29/ See, e.g., App. 186-7, 180.

acquisitions,[30] and attempted explanations for ETMF's racial/ethnic employment statistics.[31]

The class action issue was presented and the district court decided it. In light of what actually happened at trial, it would be inconsistent with the parties' and the court's conduct of the case to give the disputed stipulation the strained reading urged by ETMF. The Fifth Circuit properly refused to do so.[32] The stipulation concerning issues for trial is most logically read as indicating at most that the parties would reserve the class action issue for later determination, while introducing pertinent evidence as it arose in the course of the trial of individual claims. This Court must therefore reject the suggestion (ETMF Br. 25, 37) that the class action was not properly before the

30/ See, e.g., App. 161-2, 168-9, 310.

31/ See, e.g., App. 149, 181-6.

32/ The Fifth Circuit correctly concluded that, "The stipulation was apparently entered into in an attempt to eliminate some confusion in the exposition of evidence at trial, not to foreclose the class issues. The plaintiffs continued to proceed as in a class action, and this was made clear to the trial court and the defendants."(505 F.2d at 52; App.82)

district court.[33]

D. The District Court Erred in Dismissing the Class Action.

The District Court's order does not specify on precisely what grounds it concluded that the case was not a "proper one" for class action treatment. But none of the reasons discussed by the court below justified its dismissal of the class action.

Plaintiffs' failure to file a formal motion for certification of the class action pursuant to Rule 23(c)(1), Fed. R. Civ. P., was not sufficient reason to dismiss this class action. As the Fifth Circuit observed, while Rule 23(c)(1) contemplates that plaintiffs should timely file such a motion, it imposes the obligation to make the determination on the court (505 F.2d at 49-50; App. 77-78). Accord: EEOC v. Detroit Edison Co., 515 F.2d 301, 310 (6th Cir. 1975), cert. filed, 44 LW 3214 (Sep. 12, 1975); Advisory Committee Note to Rule 23(c)(1), 39 F.R.D. 69,

33/ Even if the Court should decide that the case was not fully tried as a class action, the case should be remanded for hearing on the class action. Even on this assumption, the district court's dismissal was erroneous.

104 (1966). In a relatively small number of districts, the federal courts have by local rule required plaintiffs to raise the issue by motion within a specified period, see ETMF Br. 24 n. 7.[34/] No district in Texas is among them. In fulfilling its obligation to determine the class action's status, a district court may, in appropriate circumstances, reach its class determination at the same time it decides the merits of a Rule 23 (b)(2) class claim, notwithstanding the direction of Rule 23(c)(1) that a determination be made "[a]s soon as practicable". Jimenez v. Weinberger, 523 F.2d 689, 697, 699 (7th Cir. 1975) (per Stevens, J.); EEOC v. Detroit Edison Co., supra, 515 F.2d at 310-11. The propriety of such a determination turns not on a wooden application of some rule of timeliness, but rather on whether it would unfairly prejudice defendants. Jimenez v. Weinberger, supra, 523 F.2d at 698-9; Senter v. General Motors Corp., 532 F.2d 511, 521-2 (6th Cir. 1976); cf. Bing v. Roadway Express,

34/ In United States v. Terminal Transport Co., 11 EPD ¶10,704 (N.D. Ga. 1976) at p.6937, the court certified a class action despite failure of plaintiffs to file a timely Rule 23(c)(1) motion as required by local rule, because of the court's "independent obligation to determine the class."

Inc., 485 F.2d 441 (5th Cir. 1973) [Bing II].

In the instant case, as in Senter and Bing II, the parties proceeded with the understanding that plaintiffs had not relinquished their class claims, despite their failure to move for certification. The defendants fully presented their evidence against the class action and the class claims on the merits. Although ETMF repeatedly protested that plaintiffs' failure to move for certification deprived it of the opportunity to defend, it nowhere suggests what further evidence it would introduce; and in fact ETMF did put on a comprehensive defense on the initial issue of prima facie proof of discrimination against the class. Moreover, ETMF was content not to precipitate the class action question by filing an appropriate motion in the trial court. The company's due-process argument claiming prejudice is undermined by the self-inflicted nature of its "injury".

A local rule of court (or even a rule announced in litigation) requiring plaintiffs to seek class certification might well be consistent with Rule 23(c)(1).[35/] But its retro-

35/ However, a flexible standard allowing districts discretion to adopt rules dictated

active application to plaintiffs in this case—four years after trial—would be unfair.[36] The whole purpose of procedural rules is to inform parties of how much they must or may proceed to press their claims. In the absence of any such rule, plaintiffs could properly assume that the court—not the parties—retained the responsibility given it by Rule 23(c)(1). Plaintiffs violated no rule, and should not be penalized because of the court's oversight or desire to delay ruling on the class action until it ruled on the merits.

The trial judge was also apparently troubled, in light of Rule 23(a)(4) (App. 66), by the post-trial vote of union members (most of whom were not members of the plaintiff class) against merger of road and city seniority rosters.[37] App. 44-54; see 505 F.2d at

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by their own needs and experiences may better fulfill the purpose of Rule 23.

36/ Cf. Linkletter v. Walker, 381 U.S. 618, 622-8 (1965); James v. United States, 366 U.S. 213, 221 (1961).

37/ Most class members are not Local 657 members and therefore could not vote; likewise, many persons at the meeting were not ETMF employees. See 505 F.2d at 51; App. 80.

50-51; App. 79-81. Such carefully staged post-trial "deliberations" under a defendant's control are of course suspect, and both the somewhat incoherent discussions and the votes taken at the Local 657 meeting are inapposite to the questions before the Fifth Circuit and this Court.[38] Only Local 657 still argues that this meeting is a significant factor in the case; the other petitioners do not rely on it.

Since neither of the reasons stated by the district court will support its dismissal of the class action, we turn to petitioners' arguments and the record to review the action's compliance with Rule 23 requirements.

E. The Fifth Circuit Correctly Held That This Case Is Maintainable As a Class Action.

The Fifth Circuit analyzed plaintiffs'

38/ The proposals voted down are not consistent with the limited transfer relief plaintiffs now seek as ordered by the Fifth Circuit, see p. 18, supra. The first proposal, as cleverly framed by the President of Local 657 (App. 46), was for a single unit for system-wide seniority throughout the Southern Conference for all truck lines (App. 51). The second proposal would have granted transfer rights with carry-over seniority to all employees on all lines in the Southern Conference (App. 52-53). Both proposals would have

compliance with Rule 23 in light of two underlying principles: that the Rule should be applied "liberally" to Title VII suits, and that Title VII cases are inherently class actions (505 F.2d at 50; App. 78). These observations reflect the uniform view of the Courts of Appeals[39/] as well as a major Con-

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adversely affected the seniority standing of many Local 657 members; plaintiffs' proper remedy would not.

39/ "Racial discrimination is by definition a class discrimination. If it exists, it applies throughout the class...And whether the Damoclean threat of a racially discriminatory policy hangs over the racial class is a question of fact common to all the members of the class." Hall v. Werthan Bag Co., 251 F. Supp. 184, 186 (M.D. Tenn. 1966). The Fifth Circuit, adopting this reasoning and noting that the Title VII plaintiff is in effect a private attorney general who vindicates public policy on behalf of others of his or her class, established a broad policy favoring class action treatment of Title VII claims in Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968), Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968), and Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969). At least five other circuits have adopted the same position: see, e.g., Barnett v. W.T. Grant Co., 518 F. 2d 543 (4th Cir. 1975); Senter v. General Motors Corp., 532 F.2d 511 (6th Cir. 1976); Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Reed v. Arlington Hotel, Inc.,

gressional policy embodied in Title VII. As this Court recognized in Griggs v. Duke Power Co., 401 U.S. 424, 426 (1971), Congress meant to allow and encourage class treatment of employment discrimination claims. Congress explicitly approved private class action proceedings under Title VII when it amended the Act in 1972.[40/] Congress also

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476 F.2d 721 (8th Cir. 1973); and Rich v. Martin Marietta Corp., 522 F.2d 333 (10th Cir. 1975). No Circuit Court has rejected this general approach.

40/ The House passed a bill that would have severely restricted or eliminated private class actions. The Senate rejected any such restrictions. The Committee Report on Section 706(d) of the Senate Bill (dealing with EEOC Commissioners' charges) stated:

> This section is not intended in any way to restrict the filing of class complaints. The committee agrees with the courts that Title VII actions are by their very nature class complaints, 16/ and that any restriction on such actions would greatly undermine the effectiveness of Title VII.

S. Rep. 415 at 27, 92d Cong., 1st Sess.(1971) (emphasis added). Footnote 16 cited several leading class action decisions, including Oatis v. Crown Zellerbach Corp., supra n. 39, and Jenkins v. United Gas Corp., supra n. 39.

The Conference Committee adopted the

recognized in 1972 that the important Title VII policy of ensuring complete relief to victims of discrimination, Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-21 (1975),

Senate's position on class actions. The section-by-section analysis of §706(f)(1) of Conferees' final bill states:

> In establishing the enforcement provisions under this subsection and subsection 706(f) generally, it is not intended that any of the provisions contained therein are designed to affect the present use of class action lawsuits under Title VII in conjunction with Rule 23 of the Federal Rules of Civil Procedure. The courts have been particularly cognizant of the fact that claims under Title VII involve the vindication of a major public interest, and that any action under the act involves considerations beyond those raised by the individual claimant. As a consequence, the leading cases in this area to date have recognized that Title VII claims are necessarily class complaints and that, accordingly, it is not necessary that each individual entitled to relief under the claim by named in the original charge or in the claim for relief. A provision limiting class actions was contained in the House Bill and specifically

required broad treatment of related claims.[41] Complementing the judicial and Congressional approval of Title VII class actions is the

> rejected by the Conference Committee.

118 Cong. Rec. 7168, 7565 (1972) (emphasis supplied). Both Chambers passed the Bill approved in Conference Committee, 118 Cong. Rec. 7170, 7573 (1972).

41/ The Conference Committee's section-by-section analysis of Title VII's remedial provision, §706(g), 42 U.S.C. §2000e-5(g), states:

> The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practices be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.

118 Cong. Rec. 4942 (1972) (emphasis added).

intent of the drafters of amended Rule 23. They designed Rule 23, and particularly subsection (b)(2), specifically to accommodate appropriate civil rights cases. See Advisory Committee Note to Rule 23(b)(2), 39 F.R.D. 69, 102 (1966).

The record supports the Fifth Circuit's conclusion that "[t]here is no serious dispute that the named plaintiffs have satisfied the first three criteria in Rule 23(a)," as well as those of Rule 23(b)(2)[42/] (505 F.2d at 50; App. 79). The numerosity requirement of Rule 23(a)(1) is easily met by the showing that ETMF employed approximately 200 minority city drivers in Texas (App. 315). The commonality requirement of Rule 23(a)(2) is satisfied by the large number of common issues related to ETMF's discriminatory hiring policies, the no-transfer rules and their justifications, and the dual seniority system and its effects, mechanisms, and justifications. The typicality requirement of Rule

42/ Defendants do not contest the applicability of Rule 23(b)(2) if the standards of Rule 23(a) are met. Defendants' actions were on grounds generally applicable to the class—race or national origin—and plaintiffs sought appropriate class-wide relief.

23(a)(3) is met because the plaintiffs, like class members, were subjected to a policy limiting minority truck drivers to city jobs and were locked in to those jobs by the no-transfer rules and dual seniority system. Petitioners' defenses included extensive efforts to explain and justify both ETMF's general hiring policies, and the restrictive seniority and transfer policies.[43/]

ETMF argues that this action as defined by the Fifth Circuit fails to meet the conditions of Rule 23(a)(3) and (4) (Br. 33-36). Its argument as to Rule 23(a)(3) is based on the premise that all hiring responsibilities remain at local terminals. This assumption is inaccurate insofar as road driver hiring is concerned (see pp.12-13, supra). Moreover, the absence of minority road drivers at all terminals confirms a uniform policy or pattern of racial exclusion. The premise is also inconsistent with the strong evidence of racially-defined patterns in city driver hiring (see pp.7-9, supra). There are, therefore, substantial common questions concerning the employment of Mexican American and Black truck drivers at the allegedly independent terminals.

43/ See pp.31-32, supra.

This satisfies Rule 23(a)(3); typicality does not mean that the claims of named plaintiffs must be in every respect identical to those of all class members. Rich v. Martin Marietta Corp., 522 F.2d 333, 340 (10th Cir.1975); Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2nd Cir. 1968).

ETMF also contends that plaintiffs fail to meet the Rul 23(a)(4) requirement of adequate representation. Its contention hinges on the alleged distinctions between road and city-only terminals. From these it implies that named plaintiffs and other employees at city terminals may have weaker claims on the merits than the few class members at road domicile terminals. Even accepting those assertions, which are by no means clear, ETMF has not demonstrated the requisite antagonism of interests which would be fatal to plaintiffs' class representation. 44/

44/ It is well settled that a plaintiff may lose his individual claim and still represent the class. Huff v. N.D. Cass Co., 485 F.2d 710 (5th Cir. en banc 1973); cf. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-8 (1974). ETMF's suggestion that the efficacy of class representation will be affected by the relative merits of plaintiffs' claims to relief, compared to those of the class, is purely speculative. Individual entitlements

The arguments advanced by ETMF would at most justify narrowing the scope of the class action or providing for appropriate orders in conduct of the action, cf. Rule 23(d)(2). They cannot support the district court's judgment dismissing the class claims entirely. The district court erred in ignoring the obvious possibilities for properly dealing with the scope-of-class questions raised by ETMF, as suggested by the Court of Appeals. The district court could and should have utilized sub-classes pursuant to Rule 23(c)(4); framed the relief to fit differing circumstances and locations; and if necessary narrowed the class. 505 F.2d at 51, 62-63, 65; App. 81, 103-4, 109; cf. Franks v. Bowman Transportation Co., 47 L.Ed.2d 444, 470-1 (1976).

The Southern Conference urges that the scope of the class determined by the Fifth Circuit is inappropriate; it argues that at most a terminal-wide class is proper (Br.24). It relies in part on the existence of the government's ETMF pattern-and-practice action. That reliance is misplaced, since private

can be neither subordinated to nor advanced by determination of the class members' claims.

Title VII litigants cannot be barred from seeking relief by a decree not granting the relief in a government action to which they were not parties, Williamson v. Bethlehem Steel Corp., 468 F.2d 1201, 1203-4 (2nd Cir. 1972), cert. denied 411 U.S. 931 (1973).[45/] The Fifth Circuit recognized this (505 F.2d at 66; App. 109-10). Contrary to the Teamsters' implication, multi-terminal class actions are a commonplace in Title VII trucking industry cases. See, e.g., Sagers v. Yellow Freight System, Inc., 58 F.R.D. 54 (N.D. Ga. 1972), 388 F. Supp. 507, 511 (N.D. Ga. 1973), aff'd, 529 F.2d 721 (5th Cir. 1976) (Southern Conference-wide class action held proper).[46/]

45/ The partial consent decree in the government's action provides no relief for most minority city drivers at city-only terminals (see App. 431-2). It is an open question not here presented whether, in a government pattern-and-practice action, class members have a right to object to a settlement as they would under Rule 23(e), Fed. R. Civ. P., cf. United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826, 875-8 (5th Cir. 1975), cert. denied 48 L.Ed.2d 187 (1976). No such objection procedures were utilized in United States v. East Texas Motor Freight, supra.

46/ See also: Freeman v. Motor Convoy, Inc., 409 F. Supp. 1100 (N.D. Ga. 1976) (Southern Conference); United States v.

In suits centering on road-driver positions, multi-terminal class actions are particularly appropriate for several reasons: the regional and national structure of collective bargaining, the resulting uniformity of road driver contracts, and the geographically extended situs of a road driver's work.

The Fifth Circuit's disposition of the cases leaves to the district court's informed exercise of remedial discretion all appropriate options for proper handling of the class action. Under its instructions for remand, many or even most members of the class may not qualify for relief, see 505 F.2d at 62-63, 64-65, App. 102-4, 107-8. But the district court could not properly refuse to consider their claims for relief and dismiss them out of hand. This outright dismissal was the court's basic error, and the fact that it was erroneous was the appellate court's basic holding. That holding was correct and should be affirmed.

T.I.M.E.-D.C., Inc., 517 F.2d 299 (5th Cir. 1975), cert. granted 44 LW 3669 (May 24, 1976) (nationwide); United States v. Lee Way Motor Freight, 7 EPD ¶9066 (W.D. Okla. 1973) (nationwide); United States v. Navajo Freight Lines, 525 F.2d 1318 (9th Cir. 1975)(nationwide); Franks v. Bowman Transportation Co.,

II. PLAINTIFFS PROVED A PRIMA FACIE CASE OF DISCRIMINATION IN HIRING AND ASSIGNMENT OF TRUCK DRIVERS THROUGHOUT ETMF'S TEXAS SYSTEM.

A. Standards of Proof Different From Those Announced in McDonnell-Douglas Corp. v. Green Are Applicable to This Class Action Challenging Systemic Discrimination Practices.

In directly confronting the broad question of what standards should govern the prima facie proof of Title VII class actions, the Court faces issues which are novel at this level[47/] and of critical importance to the efficacy of Title VII. The Court's decision in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973), scrupulously left the issues open. There the Court noted at the

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supra (company-wide); United States v. Trucking Employers, Inc., 12 EPD ¶11,162 (D. D.C. 1975) (nationwide, multi-employer defendant class action).

47/ The Court is, of course, no stranger to Title VII class actions, having dealt with them on the merits in Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); and Franks v. Bowman Transportation Co., 47 L.Ed.2d 444 (1976). But this case presents important issues not previously joined before the Court.

outset that "the critical issue before us concerns the order and allocation of proof in a private non-class action challenging employment discrimination," 411 U.S. at 800 (emphasis supplied). After formulating its four-part outline for prima facie proof in such an individual case, the Court further noted that,

> The facts will vary in Title VII cases and the specification of the prima facie proof required from respondent [the plaintiff] is not necessarily applicable in every respect to differing factual situations.

411 U.S. at 802. The Court also took pains to note that class-type proof might also be relevant to the discrimination issue in an individual claim context, and stated that statistical evidence would be probative of an employer's "general [minority] employment policy." See, 411 U.S. at 804-5.[48/]

48/ "Other evidence that may be relevant to any showing of pretext includes facts as to petitioners' general policy and practice with respect to minority employment.18 On the latter point, statistics as to petitioner's employment policy and practice may be helpful...

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[18]The district court may, for example, determine...that

Prima facie proof of class-wide discrimination must be measured against different standards than those announced in McDonnell-Douglas. In the context of a substantial class action, a case under those standards would be wholly unmanageable. To require individual proof of application, qualification, and vacancy would reduce Rule 23 in Title VII class actions to little more than a permissive joinder device.[49/] This would contradict the express purpose of the 1966 amendments to Rule 23. The Advisory Committee which drafted the amendments sought to

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> the [racial] composition of defendant's labor force is itself reflective of restrictive or exclusionary practices . . . [S]uch general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision . . ."

[emphasis supplied]

49/ It would also appear contrary to this Court's decision in Franks v. Bowman Transportation Co., 47 L.Ed.2d 444, 466 (1976).

streamline and rationalize class action procedures, see Note of Advisory Committe on the Rules, 39 F.R.D. 69, 98-99 (1966); Wright & Miller, Federal Practice and Procedure--Civil (1972) §1752, p. 525; §1753, pp. 538 ff. The drafters recognized in particular that subdivision 23(b)(2) would provide the appropriate procedural framework for adjudicating claims of discrimination based on policies or practices generally applicable to groups of persons on a racial basis; 39 F.R.D. at 102. The primary inquiry in that framework is to the existence of the overall practices and their classwide implications--not into the individual circumstances of persons within the class, id.

ETMF purports to concede that proper Title VII class action trial procedure includes bifurcated proceedings with individual proof of application, qualification, and vacancy (as appropriate) reserved for the second-stage proceedings (ETMF Br. at 51-55).[50/] Yet it artfully renders the con-

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50/ See Baxter v. Savannah Sugar Refining

cession nugatory by insisting that, as part of the prima facie class case, plaintiffs must adduce specific "proof of injury" to class members (id. 52).[51/] Such a requirement, if applied literally, would minimize the usefulness of class action proceedings as a means of presenting group claims, contrary to the purpose of the 1966 amendments. Burdensome proof requirements are simply inappropriate at the first, prima facie proof stage of Title VII actions.[52/]

Common sense and experience dictate a second and more basic reason to apply standards different from the test for individual claims, in a broad class action. The exis-

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Corp., 495 F.2d 437, 443 (5th Cir. 1974), cert. denied, 419 U.S. 1033 (1974); United States (Ford) v. United States Steel Corp., 520 F.2d 1043, 1053-4 (5th Cir. 1975); cert. denied __U.S.__ (October 4, 1976).

51/ The degree of specificity urged by ETMF, as reflected in cases it quotes and its own reformulation of the doctrine, is great. See ETMF Br. at 53-55.

52/ This issue is squarely presented and extensively argued to this Court in the United States v. T.I.M.E.-D.C. case, Nos. 75-636, 75-762.

tence of class-type employment patterns (such as a statistical absence of minority road drivers, or a racially-determined job assignment pattern throughout Texas) fundamentally alters the problems of proof and evidence inherent in individual claims. A considerable degree of legitimate uncertainty may surround determination of the actual reason for non-employment of a particular worker in a particular job.[53/] But when many individual workers of a minority class fail to obtain employment in many different job slots in a number of locations, the reason lies not in examination of the specific facts of each application but in a general practice of discouraging or rejecting such applications.[54/]

53/ See, for example, the Court's discussion of the individual claims in McDonnell-Douglas Corp. v. Green, supra, 411 U.S. at 803-6.

54/ The instant case amply illustrates our point. The exclusion of all minorities from all 180-odd road driver positions in the State of Texas over a period of many years--coupled with transfer and seniority policies which here and everywhere else have the effect of perpetuating that exclusion--is more than a simple summary of numerous individual decisions to hire Anglo drivers. It is simply inconceivable, in this case, that all 180 employment decisions could have been made without reference to racial considerations.

Application of McDonnell-Douglas standards to such a case would ignore the most pertinent and probative evidence.[55/]

Title VII class actions are different from individual claims: at one more complex and more susceptible of prima facie determination based on objective, unambiguous evidence. Standards for proof must reflect this difference.

B. Prima Facie Proof By Statistics And By Patterns and Practices of Discrimination Shifts The Burden Of Explanation To Defendants.

ETMF misrepresents the record as containing no evidence of class-wide discrimination except a "general imbalance" in its road driver work force. (Br. 37, 41-42).[56/] Although it seeks to characterize plaintiffs'

55/ At least two courts have articulated the link between statistical probability and proof of discrimination. United States v. Bethlehem Steel Corp., 312 F.Supp. 977, 992 (W.D. N.Y. 1970), aff'd in pert. part, 446 F.2d 652 (2nd Cir. 1971); United States v. Sheet Metal Workers Local 36, 416 F.2d 123, 127 n. 7 (8th Cir. 1969).

56/ Similarly, in its petition for certiorari the Southern Conference misleadingly summarizes the evidence as showing "the mere existence of a statistical imbalance in racial

case as founded on mere statistics, in fact plaintiffs proved the presence of discrimination policies by extensive non-statistical evidence. That proof includes: the local, state-wide, and national patterns of segregated job assignments in ETMF (pp. 6-8, supra); the familiar lock-in rules preventing transfer and seniority carry-over (pp. 9-11, supra); failure to utilize centralized road driver hiring practices to match minority applicants with available vacancies (pp. 12-13, supra); failure to follow purported hiring standards for Anglo road drivers (pp. 11-12, supra); extension of special transfer rights to city drivers on a basis that excluded most minorities (p. 10 and n.9, supra); and the harsh reception of plaintiffs' applications for road driver positions (pp. 14-17, supra). Defendants' understatement of the case notwithstanding, the record shows that their employment practices and their effects bear all the hallmarks of the typical nationwide pattern of discrimination prevailing in

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composition of employees in a particular job classification" (Pet. 3, Question 1).

in the trucking industry. Road driver jobs are for white men only.[57/]

Even if this were a case in which plaintiffs relied on statistics alone, the dramatic evidence of racial hiring throughout ETMF's system would suffice to make out a prima facie case of class discrimination practices. This Court has emphasized the significance of statistical proof of racial exclusion; see, e.g., Turner v. Fouche, 396 U.S. 346, 360 (1970). As the Fifth Circuit pithily stated, "[i]n the problem of racial discrimination, statistics often tell much, and courts listen", Alabama v. United States, 304 F.2d 583, 586 (5th Cir. 1962), aff'd, 371 U.S. 37 (1962). At least six circuits--the Fourth;[58/]

57/ See, e.g., cases and studies cited by the Fifth Circuit, 505 F.2d at 53-54 and nn. 16, 17, App. 85-87 and nn. 16, 17. Many more cases could be cited.

58/ Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377, 1382 (4th Cir. 1972), cert. denied, 409 U.S. 982 (1972) (statistics especially valuable "because proof of discrimination is seldom direct"); Barnett v. W.T. Grant Co., 518 F.2d 543, 549 (4th Cir. 1975) ("statistics can in appropriate cases establish a prima facie case of discrimination without the necessity of showing specific instances of overt discrimination").

Fifth,[59/] Sixth,[60/] Eighth,[61/] Ninth,[62/] and Tenth,[63/]--have expressly recognized the great weight carried by statistical evidence in Title VII class action cases. This Court has noted that statistics may be probative

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59/ Bing v. Roadway Express, Inc., 444 F.2d 687, 689 (5th Cir. 1971); United States v. Hayes Int'l. Corp., 456 F.2d 112, 120 (5th Cir. 1972) (statistical evidence alone may present a prima facie case of discrimination").

60/ Senter v. General Motors Corp., 532 F.2d 511, 527 (6th Cir. 1976); Afro-American Patrolmen's League v. Duck, 503 F.2d 294, 299 (6th Cir. 1974).

61/ Parham v. Southwestern Bell Tel & Tel Co., 433 F.2d 421 (8th Cir. 1970) (statistical proof established a violation of Title VII); United States v. Sheet Metal Workers Local 36, 416 F.2d 123, 127 n.7 (8th Cir. 1969); Reed v. Arlington Hotel, Inc., 476 F.2d 721, 723 (8th Cir. 1973).

62/ United States v. Ironworkers Local 86, 443 F.2d 544, 551 (9th Cir. 1971), cert. denied, 404 U.S. 984 (1971); Kaplan v. Int'l Ass'n of Theatrical and Stage Employees, 525 F.2d 1354, 1358 (9th Cir. 1975).

63/ Jones v. Lee Way Motor Freight, 431 F.2d 245, 247 (10th Cir. 1971), cert. denied 401 U.S. 954 (1971); Muller v. United States Steel Corp., 509 F.2d 923, 926 (10th Cir. 1975); Taylor v. Safeway Stores, Inc., 524 F.2d 263, 271 (10th Cir. 1975) ("racial statistics are an entirely appropriate method of proving prima facie discrimination").

even in single-claim cases, McDonnell-Douglas Corp. v. Green, supra, 411 U.S. at 805. Statistical evidence of exclusion is reinforced by evidence showing how the systematically exclusionary practices operate. Barnett v. W.T. Grant Co., 518 F.2d 543, 549 (4th Cir. 1975); Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377, 1382 (4th Cir. 1972), cert. denied, 409 U.S. 982 (1972). The combination of statistical and systemic evidence proves both the results and the mechanism of employment discrimination.

The Courts of Appeals regularly hold in Title VII cases that clear statistical patterns of racial exclusion justify "shifting the burden of proof" to defendants, requiring them to explain why--if not for discrimination--so few minorities hold particular jobs. The Fifth Circuit's holding in United States v. Hayes Int'l Corp., 456 F.2d 112, 120 (5th Cir. 1972) is representative of such decisions:

> The inference [of racial discrimination] arises from the statistics themselves and no other evidence is required to support the inference. At this stage of the proceedings it was not necessary for the [plaintiff] Attorney General to show the availability of skilled Negroes in the community perform the jobs in question because the burden of going forward and showing the lack of qualified Negroes was upon Hayes. . . .

When policies or practices commonly associated with racial discrimination complement strong statistical evidence, the inference is all the more compelling. The nature of class actions and class-wide proof, see pp. 50-54, supra, justifies and even requires drawing inferences and shifting burdens of proof in such cases.[64/] It is both logical and fair to demand that employers come forward to explain a statistical pattern of exclusion. This is particularly the case in Title VII situations where the defendants ordinarily have far greater access to employ-

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64/ This is particularly true in discrimination cases, since as many courts have noted, the perpetrators of discrimination almost never admit their design. Brown v. Gaston County Dyeing Machine Co., supra, 457 F.2d at 1382, Marquez v. Omaha Sales Division, Ford Motor Co., 440 F.2d 1157, 1162 (8th Cir. 1971); Rogers v. International Paper Co., 510 F.2d 1340, 1345 (8th Cir. 1975), vac'd and rem'd on other grounds, 46 L.Ed. 2d 29 (1975).

ment records and other evidence than do plaintiffs.

The courts' reliance on statistical evidence as a basis for inferring discrimination practices is founded in their extensive experience with what they invariably find beneath the surface picture painted by statistics.[65/] The ETMF situation is illustrative. In the case at bar, discovery and proof was restricted by the limited resources of the private plaintiffs for investigation and documentation of specific incidents or local situations. Even so, they built an impressive case showing comprehensive discrimination practices of many types, see pp. 55-6, supra. When the United States Justice Department, with its vast resources,[65a/] investigated the facts underlying ETMF's statistics, it found vivid proof of overt racism. Based on this proof, Judge Hughes in the Northern District of Texas found, "[t]he

65/ Thus, the Fifth Circuit, which has long experience with the racial reality underlying "the inexorable zero", United States v. T.I.M.E-D.C., Inc., supra, 517 F.2d at 315, has aptly observed that, ". . . Nothing is as emphatic as zero . . .", United States v. Hinds County Bd. of Ed., 417 F.2d 852, 858 (5th Cir. 1969).

65a/ Including the Federal Bureau of Investigation, which was used extensively in the ETMF matter.

evidence showed that discrimination occurred against Blacks and Spanish-surnamed Americans who applied for or attempted to transfer to over-the-road jobs," and that ETMF did not comply with its own hiring standards, United States v. East Texas Motor Freight System, Inc., 10 EPD ¶10,345 (N.D. Tex. 1975) at p. 5416. Among the evidence before the court was the following:

> (i) Until at least 1963 the ETMF application form required applicants to state race and national origin.[66/]
>
> (ii) ETMF's former personnel director testified, "The Company, so far as road drivers was concerned, did not want to employ minorities as road drivers" until at least 1967. [67/]
>
> (iii) A proferred 1966 memorandum from a terminal manager to the personnel director discussing what to do "if and when we must hire colored boys". [68/]

66/ Portions of record in United States v. East Texas Motor Freight System, Inc., lodged by Amicus Curiae NAACP Legal Defense and Educational Fund, Inc.,pp. 234, 236, 244, 245, 282-288.

67/ Id., p. 38.

68/ Id., p. 276.

(iv) Application forms and other documents and summaries thereof listing dozens of individual white road drivers who failed to meet ETMF's purported hiring standards, such as driving experience and safe driving records. 69/

(v) A 1966 memorandum from the personnel director outlining ways to frustrate EEO compliance procedures designed to increase minority hiring: for example, by refusing to notify the NAACP or National Urban League of vacancies, although "expected" to do so, "until or unless greater pressure is exerted". The same memorandum recommends that ETMF "[r]etain our flexible criteria for job selection at all levels". 70/

(vi) The personnel director testified that ETMF instituted the no-transfer rule in order to prevent Black city drivers in St. Louis from transferring to the road. 71/

69/ Id., pp. 149-219, 227-232, 268-274.

70/ Id. pp. 278-280.

71/ Id. p. 47.

Although the foregoing evidence is not of record in the instant case, it shows what, here as in other cases, lies behind the "mere statistics" that petitioners would have the Court discount completely. 72/

Decisions recognizing the weight of statistical and other pattern-and-practice evidence and holding that it shifts the burden of proof are correct for another, practical reason. Private litigants, on whom Congress primarily relied to enforce Title VII's prohibitions, 73/ cannot conduct investigations at the prima facie proof stage like those that unearthed the government's massive evidence in United States v. East Texas Motor Freight System, Inc., supra, and United States v. T.I.M.E.-D.C., Inc., 517 F.2d 299 (5th Cir. 1975), cert. granted May 24, 1976 (Nos. 75-636,-672); and see n.72, supra.

72/ Compare, e.g., Jones v. Lee Way Motor Freight, supra, n.63 (private action decided on basis of statistical evidence), with United States v. Lee Way Motor Freight, 7 EPD ¶9066 (W.D. Okla., 1973) (government action decided with massive and detailed findings as to individuals, confirming statistical proof in Jones).

73/ Albemarle Paper Co. v. Moody, 422 U.S. 405, 415 (1975); Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974); Jenkins v. United Gas Corp., 400 F.2d 28, 33 (5th Cir. 1968); Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 716 (5th Cir. 1974).

Statistical evidence has broad patterns of discrimination are within the capability of diligent private litigants to prove at the initial stage. A rule that allows a finding of prima facie proof to be based on appropriate evidence of this type and shifts the burden of explanation to defendants is critical to the viability of class actions brought by "private attorneys general", see cases cited in n.73, supra.

C. Plaintiffs Proved A Prima Facie Case Of Hiring Discrimination Against The Class Of Minority City Drivers.

Plaintiffs succeeded in proving a prima facie case of class-wide hiring discrimination under the standards discussed in the preceding section, or under any proper standards. We have previously set out the statistical and systemic evidence in this record, see pp. 6-8 , supra, which we submit is sufficient to shift the burden of proof to defendants. Petitioners seek to blunt the force of this evidence by focusing narrowly on two points: the alleged lack of proof of initial hiring discrimination affecting minority road drivers, and the fact that ETMF did not domicile road drivers at

San Antonio, where plaintiffs applied and were hired. We believe that terminal-by-terminal workforce data is itself sufficient to raise the inference of discrimination in initial hiring of truck drivers throughout Texas. But there is more evidence and it meets petitioners' arguments.

ETMF claims that "[t]here is no evidence in the record to support...an assertion" that "minority drivers" were hired in city driver-only terminals in disproprionate numbers"(Br. 40 n. 10).[74/] But in fact, the statistical evidence strongly supports that conclusion. In February 1972, of the 196 minority city drivers in Texas, 155 (79%) were locked in at road-driver domicile terminals. Of the 380 Anglo city drivers, only 212 (56%) were located at city-only terminals.[75/] When the 23 minority city drivers at El Paso are excluded from this computation,[76/] 155 (89%) of the other minority city drivers were at city driver-only terminals.

74/ See p. 77 , infra.

75/ Figures based on App. 352-415.

76/ This is realistic, not arbitrary,

The Southern Conference asserts that

> The make-up of city employees at terminals across the State of Texas, generally reflected the racial-national origin make-up of the respective communities in which the terminals were located.

(Southern Conference Br. 8). This assertion is manifestly untrue as to city drivers. In February 1972, there were at least 11 terminals in which all the city drivers (a total of some 141 persons) were white;[77] they are located in areas ranging from approximately 10% to 35% minority population.[78] At two other terminals in 20% minority cities—San Angelo and Longview—ETMF employed 46 Anglo

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since it is patently clear that at El Paso before 1971 all truck driver hiring was on a racial basis.

77/ They are: Abilene, Amarillo, Austin, Brownwood, Fort Worth, Lubbock, Lufkin, Marshall, Odessa, Texarkana, Tyler. Fort Worth, a city with about 29% minority population, has 35 white city drivers. See App. 352-415.

78/ Source for all population figures in this paragraph: United States Department of Commerce, Bureau of the Census, 1970 Census of Population, vol. 1, Part 45 (Texas), Tables 23, 81, 102, 108, 112.

city drivers and only two minority drivers.[79] At Dallas, with [illegible] minority population, ETMF had only 16 minority city drivers (13%) out of 123 total. All three terminals at which minority city drivers predominated had substantially higher percentages of minorities than the local population figures.[80] At no terminal in Texas did the ETMF city driver force closely approximate the racial/ethnic composition of the area in which it was located.

It is evident from the figures just cited that race and national origin were factors in staffing city driver jobs as well as road positions. The paradigm case is El Paso. Until mid-1971 all Mexican American truck drivers were hired into city jobs while all white truck drivers were being hired over-the-road (see App. 374-77). It is simply impossible to believe that all 23

79/ App. 397-98, 406.

80/ In El Paso, 54% minority population, 23 out of 23 (100%) of the city drivers were minorities. (App. 376-77) In Houston, 38% minority population, 110 (70%) out of 157 city drivers were minorities (App. 385-91). In San Antonio, 53% minority population, 41 (82%) out of 47 of the city drivers were minorities (App. 408-10).

minorities announced their exclusive interest in city work while all 50-odd whites selected road runs. The Court may well infer what actually happened in at least some cases: white and minority "truck drivers" applied for work, and were channelled into road or city driving on the basis of race. While El Paso provides the most vivid example, the picture all across Texas is essentially similar (see pp. 6-8, supra).[81/]

ETMF's attempt to explain the plaintiffs' proof of racial exclusion from road driver jobs in terms of labor markets (Br.45) is singularly unimpressive. It does not even address the racially bifurcated El Paso sitatuation, or explain why there are no minority road drivers at Dallas and no minority city drivers at Fort Worth. Likewise, ETMF's suggestion that lack of skilled minority drivers in the job market explains their absence is unconvincing. Census data for 1970 show that 39% of all truck drivers in Texas are Spanish-surnamed or Black.[82/] Moreover,

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81/ See especially p.9 n.8, supra, with respect to Houston.

82/ Source: United States Department of Commerce, Bureau of the Census, 1970 Census of Population, Vol.1, Part 45 (Texas), Table 54.

in its consent decree in the government's pattern and practice suit, ETMF agreed as a temporary hiring goal (subject to availability) that 50% of its new road driver hirees would be Spanish-surnamed or Black (App.435). This goal will remain in effect until ETMF's road driver force at each terminal reflects the minority percentage in the adult workforce of the area (id.). Moreover, after being sued in San Antonio, Dallas, and Memphis, ETMF hired 30% minority road drivers in 1972 (App. 184). There was no shortage of qualified minorities once ETMF opened its doors to them.

Petitioners rely most heavily on the fact that plaintiffs worked only as city drivers at San Antonio, where ETMF stationed no road drivers. From this they argue that there was no past hiring discrimination whose effects could be perpetuated by their lock-in devices (see ETMF Br. 45-49, 57, 59-61; Southern Conference Br. 18-22). Petitioners seek to deflect, but do not meet, the main thrust of respondents' case: ETMF's refusal to employ

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The reason most of these have in-city jobs, or work on the road for smaller independent companies rather than major Teamsters lines like ETMF, Yellow Freight, Western Gillette, or T.I.M.E.-D.C. is because the latter have historically excluded minority drivers from road positions.

minority line drivers systemwide meant that plaintiffs would have been hired as city drivers regardless of where they had initially applied. "It was their inability to gain a road driver job with ETMF at any terminal that plaintiffs decry", 505 F.2d at 55; App. 88.

ETMF points out that plaintiffs did not identify a large number of minority applicants for road driver positions at road-domicile terminals. In part this reflects the necessary and appropriate limitations on the proof of a prima facie case. In the case of San Antonio, the focus of the live testimony, plaintiffs Rodriguez and Perez, and witness Gomez, specifically testified that they would have moved to take a road position (see pp. 14-15, supra). Their willingness reflects the fact that truck drivers are more mobile than other parts of the labor force. The fact that more minorities were not shown to have applied expressly for a road driver job is also due to ETMF's exclusionary policies. Given the obvious and well-known fact that ETMF would not consider minorities for road driver positions, it is not suprising that few applied. In similar

cases, the courts have refused to condition findings of discrimination or eligibility for relief upon the making of a futile gesture of this type. See, Hairston v. McLean Trucking Co., 520 F.2d 226, 231-32 (4th Cir. 1975);[83/] Sagers v. Yellow Freight System, Inc. supra, 529 F.2d at 731, and other Fifth Circuit cases there cited; United States v. Sheet Metal Workers Local 36, 415 F.2d 123, 132 (8th Cir. 1969).

ETMF cannot hope to prove that the statistical patterns of racial exclusion resulted from anything but discrimination. Instead, it argues that plaintiffs had the burden to prove them as part of their prima facie case. The burden would be misplaced here. Plaintiffs have already presented substantial indicia--statistical and otherwise--of classwide discrimination practices. Rather than compounding their burden, it is properly

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83/ As the Fourth Circuit pointed out, "If an employer can avoid [back pay] liability through a policy which makes an attempt to gain a better job risky or futile, then this subtle form of discrimination is encouraged, not discouraged." 520 F.2d at 232.

shifted to defendants. Just last Term, this Court foreshadowed acceptance of this type of burden-shifting in a factually similar trucking case, Franks v. Bowman Transportation Co., supra. In rejecting a district court's denial of relief for failure to show "vacancy, qualification, and performance" for class members, the Court held:

> Generalizations concerning such individually applicable evidence cannot serve as justification for the denial of relief to the entire class... [P]etitioners here have carried their burden of demonstrating the existence of a discriminatory hiring pattern and practice by the respondents and, therefore, the burden will be upon respondents to prove that individuals. . . were not in fact victims of previous hiring discrimination.

47 L.Ed.2d at 466.

The record shows that petitioner's policies were unlawful and there was a class of discriminatees who were victims of ETMF's segregated hiring. The identification of those individuals actually injured by the discrimination practices awaits second stage proceedings. But this Court's decisions in Franks v. Bowman Transportation Co., supra,

and Albemarle Paper Co. v. Moody, supra, compel the district court to conduct proceedings and exercise discretion to grant all victims of discrimination the most complete relief practicable in the circumstances. The application of an unmanageable and inappropriate standard for prima facie proof of class discrimination would leave discrimination policies uncorrected and deprive victims of discrimination of their remedy. The Court should therefore hold that respondents proved a prima facie case of past discrimination.

III. THE NO-TRANSFER RULES AND DUAL SENIORITY SYSTEM WHICH LOCKED THE PLAINTIFF CLASS OUT OF ROAD DRIVER POSITIONS WERE UNLAWFUL.

The purpose and effect of petitioners' no-transfer rules and dual seniority system were to prevent minority city drivers from obtaining road driver positions (App. 155, 174, 233). Petitioners were 100% successful in keeping their minority city drivers from Texas in their places by these means. Against the background of discrimination in hiring and assignment proved by plaintiffs, as analyzed in the preceding section, we demonstrate in this section that petitioners' transfer and seniority practices were unlawful as applied to the plaintiff class. In the following argument section, pp. 93-109 infra, we respond to several arguments by the unions that they should escape liability even if those practices violate the rights of Mexican American and Black city drivers.

A. No-Transfer Rules.

ETMF rules prohibit transfer from city to road positions and between any jobs at different terminals (see pp. 10-11, supra).[84/]

84/ The implementation of the city-to-road no-transfer rule may have varied slightly over time. The collective bargaining agreements do not specifically prohibit such transfers, but are silent on the issue; the separate contracts provide, however, for road and city seniority by terminal (App. 218; compare App. 332-2 with App. 346-7). At some point these provisions were accompanied by a strict rule barring transfers. Trinidad Gomez, a senior San Antonio city driver, testified

> Well, back in the early 60's when a member would ask, he would be told that there were two seperate [sic] contracts, that there were no transfers. Then in the late 60's, middle 60's we were told that we could transfer but we would have to lose our seniority. (App. 132)

The district court found that ETMF required a city driver seeking to transfer to the road, inter alia, to relinquish his current position, apply in writing at the terminal where he sought to drive, and relocate to that terminal (App. 58). Viewed most favorably to defendants, the no-transfer rule requires city drivers to be treated like any other new job applicants.

The impact of these rules falls mostly on Mexican American and Black city drivers. All city drivers at road driver domicile terminals had one opportunity to transfer in 1972, when one of the two no-transfer rules was

temporarily suspended (see p. 10, supra). The remaining group which has never had any opportunity to transfer includes 155 of ETMF's 196 minority city drivers (79%), but only 212 of the 380 Anglo city drivers (56%). Even these figures understate the exclusionary impact of the rules, since Anglos faced no racial bar to becoming road drivers initially, while Mexican American and Black city drivers manifestly did. The no-transfer rules therefore operate as a selection device which screens out a far higher proportion of minority than Anglo city drivers from consideration as road drivers.[85/] In this group perspective, the rules trigger the principle of Griggs v. Duke Power Co., supra, governing "[e]mployment procedures or testing mechanisms that operate as built-in headwinds for minority groups":

> ...[T]he employer [has] the burden of showing that any given requirement must have a manifest relationship to the employment in question.

401 U.S. at 432. ETMF appears to concede the

85/ Over twice as many Anglos (44%) as Mexican Americans and Blacks (21%) have had a chance to "pass" the no-transfer barrier.

applicability of this Griggs analysis, while disputing only that the company's hiring practices resulted in disproportionate minority hiring at city-only terminals. See ETMF Br. 40 n. 10; cf. p.65 , supra.

Seen from the perspective of individual minority city drivers, the no-transfer rules also operate as a lock-in device that restricts them to city jobs to which they were initially limited for racial reasons, and locks them out of road jobs from which they were initially excluded for racial reasons. In this perspective, the no-transfer rules fall under another major Griggs principle which requires courts in Title VII cases to

> remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

401 U.S. at 429-30. Under either analysis—from the group perspective or the individual one—the no-transfer rules are unlawful unless they can be justified by "the touch-

stone [of] business necessity," Griggs v. Duke Power Co., supra, 401 U.S. at 431.

The company has asserted that its no-transfer rules originated for and can be explained by a number of non-discriminatory reasons.[86/] But, significantly, ETMF now argues that only one of its rules is required by "business necessity," [87/] and for only one reason—that safety considerations preclude city-to-road transfers (Br. 64-66).[88/]

86/ Among the reasons advanced by ETMF are: (i) no-transfer rules make terminal managers responsible for the employees they hire (Br. 6; App. 187); (ii) they protect terminal managers from other managers' mistakes (Br. 6); (iii) they were an attempt to improve on ETMF's poor safety record by maintaining higher standards for road drivers (Br. 7, App. 162-68); (iv) a paternalistic feeling that it would be better for city drivers and their families to keep those employees at home (App. 189, 227); (v) ETMF wanted to "protect its investment" in city drivers who know their routes and customers (App. 167, 189, 227).

87/ In the present context, this Title VII term of art involves much more than a simple "demonstrable relationship to performance of the job," cf. ETMF Br. 64. The Fifth Circuit's opinion herein correctly stated and applied the settled definition, see 505 F.2d at 56-57; App. 91. See also, Watkins v. Scott Paper Co., 530 F.2d 1159, 1168 (5th Cir. 1976), cert. denied, __U.S.__(Oct. 4, 1976).

88/ ETMF apparently does not now contend

ETMF's safety argument is a shallow pretext. Whatever the original reasons for the rule's adoption,[89/] the record shows that this no-transfer rule is not and never has been necessary. If ETMF's need is to require that all road drivers are qualified, it can screen transfer applicants under legitimate road driver standards. ETMF's refusal to consider any city drivers because some would not qualify is an "artificial, arbitrary and unnecessary barrier" that violates the command to "measure the person for the job and not the person in the abstract", Griggs v. Duke Power Co., supra, 401 U.S. at 431, 436. ETMF's argument that business necessity precludes transfer is also irreconcilable with its agreement to allow such transfers to the (mostly Anglo) city drivers at road-driver domicile terminals in February, 1972 as well as to hundreds of "affected class" members in the United States v. East Texas Motor Freight

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that its rule barring inter-terminal transfers has any legal justification.

89/ Even if the rules originated for non-racial business reasons, but cf. p.62 ¶vi, supra, this would be legally irrelevant unless the rules are presently justifiable, see Griggs v. Duke Power Co., supra, 401 U.S. at 431-2.

consent decree (App. 431-3). No appellate court has ever accepted this "ubiquitous" no-transfer rule as a business necessity.[90/]

This Court should, on this record, endorse the universal view of the Courts of Appeals that no-transfer rules are not justified as a business necessity. Since they are not, and since they perpetuate the past hiring discrimination and disproportionately exclude minority city drivers, the Fifth Circuit correctly held them unlawful employment practices.

B. The Application of the Dual Seniority System to the Plaintiff Class in This Case Was an Unlawful Employment Practice.

Petitioners' dual seniority system—with separate seniority units for city and road drivers and seniority measured in each by date of entry into the unit—also deprived the plaintiff class of Title VII rights. Minority city drivers, initially barred from

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90 / See, e.g., Bing v. Roadway Express, Inc., supra [Bing I]; Jones v. Lee Way Motor Freight, Inc., supra; Sagers v. Yellow Freight System, Inc., supra; Sabala v. Western Gillette Co., 516 F.2d 1251 (5th Cir. 1975); United States v. Navajo Freight Lines, Inc., supra; Franks v. Bowman Transportation Co., 495 F.2d 398 (5th Cir. 1974), rev'd on other grounds, 47 L.Ed. 2d 444 (1976); Thornton v. East Texas Motor Freight, 497 F.2d 416 (6th Cir. 1974).

road positions by ETMF's white-only hiring policy, cannot now move to road driver jobs without forfeiting their accrued seniority. Despite ETMF's no-transfer rules, these seniority barriers are additional obstacles to be reckoned with. Each of the three plaintiffs and Trinidad Gomez, when they applied in writing for transfer to the road, were made to sign a statement that

> I fully realize that if I am accepted as a road or line driver I will loose [sic] my city seniority from the date of my employment.

(App. 324-7).[91/] Title VII prohibits infliction of this type of seniority penalty when minority workers move into a position from which they were initially excluded because of race. ETMF does not argue the lawfulness

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91/ ETMF's counsel emphasized the seniority obstacles to transfer in cross-examination of Trinidad Gomez:

> Q: ...Were you willing to give up 18 years of seniority...to be at the bottom of the road driver's roster...[where] your chance for steady work might be very remote...and you might not get any work at all, with no seniority?

(App. 131-2) Counsel pursued the same line of

of its seniority system. Both union petitioners, however, defend the system and contend that no modification of anyone's seniority position is warranted.

1. The Court Must Reach the Seniority Issue.

The union's first argument is that the Court should not reach the substantive validity of the seniority system because, as a result of the no-transfer rules and the absence of road driver jobs at San Antonio, no party was injured by its operation (So. Conf. Br. 18-23). That argument ignores the simple fact that under the union contracts drivers cannot "transfer" from the city seniority list to the road list without taking a new seniority date at the bottom of the list (App. 218). For this reason and those set out below, the Court must reach the issue of the system's validity.

The lawfulness of the seniority system must be decided to resolve the class claims. If the Court agrees with our analysis of the class action issue, pp. 26-47, supra, the

questioning with plaintiff Herrera, who indicated that the threat was a serious obstacle to him (App. 299-300; see also App. 127).

union's argument becomes frivolous. The record makes evident that at some terminals Anglo and minority driver applicants were hired into different units according to race. It would be an exercise in futility to grant these class members relief from the no-transfer rules without also granting a seniority remedy. Seniority forfeiture would still stand as a formidable artificial barrier to transfer, in violation of Title VII's purpose of removing all such barriers, Griggs v. Duke Power Co., supra, 401 U.S. at 436, and of allowing victims of discrimination the most complete relief practicable, Franks v. Bowman Transportation Co., supra, 47 L.Ed.2d at 461. For any city drivers found to have been discriminatorily excluded from road driver positions, the remedy must include seniority carry-over, see Bing II, supra, and Sagers v. Yellow Freight Co., supra.[92/]

92/ The Southern Conference notes that courts found the presence of a no-transfer rule reason to release unions from liability for seniority discrimination in Thornton v. East Texas Motor Freight, supra, and Jones v. Lee Way Motor Freight, supra. But in Thornton, the only union remaining in the case on appeal was the local, which had apparently not been named in the plaintiffs' EEOC charge and which had, moreover, actively

Even if the Court finds the class action approved by the Fifth Circuit too broad, the claims of the named plaintiffs and other San Antonio city drivers squarely raise the seniority issues. Plaintiffs and all other Mexican American or Black city drivers in San Antonio were hired before 1970 (and almost all before 1967), when ETMF had a flat policy against hiring minority road drivers (App.408-10).[93/] For plaintiffs or other class members to have applied for road positions in 1959 or 1965 would have been a futile act, as they

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sought through contract negotiation proposals to eliminate ETMF's no-transfer rule. The Sixth Circuit also noted that the Southern Conference (not the local) was responsible for the collective bargaining agreement in issue. The court's holding was closely tied to these unusual circumstances (see 497 F.2d at 423-6). In Jones, the private plaintiffs simply never joined any union defendant. The Teamsters International (IBT) was made a party to Jones' successor action, United States v. Lee Way Motor Freight Co., 7 EPD ¶9066 (W.D. Okla. 1973), in part to cure any deficiency in the relief awarded against the employer alone in Jones. Courts have found unions liable for seniority discrimination despite presence of a company no-transfer policy in Sagers v. Yellow Freight System, Inc., supra and Bing II, supra.

93/ All other minority city drivers throughout Texas were also hired before 1970.

well knew. They took the only truck driving positions then open to them. At the same time, they expressed interest in moving to road driver positions outside San Antonio, if the no-transfer rules could be overcome. At this point the dual seniority system became "operative" in their own cases, see pp. 81-82 , supra. Since they, too, were subjected to exclusionary practices, they have a present right to transfer with augmented seniority.

2. Defendants' Seniority System Is Not Bona Fide.

The Southern Conference next argues that the system of separate units for city and road drivers is a "bona fide" seniority system protected by §703(h) of Title VII, 42 U.S.C. §2000e-2(h) (So. Conf. Br. 23-36). To analyze the union's argument in context, it is necessary to recall what seniority relief plaintiffs seek: not dismantlement or fundamental change of the seniority system, or even the merger of separate rosters into a single list. All plaintiffs seek—and what the Fifth Circuit ordered—is opportunity for qualified class members to transfer from city to road

jobs with carry-over seniority.[94] This Court noted the limited nature of this type of relief in Franks v. Bowman Transportation Co., supra, 47 L.Ed.2d at 457-8. The transfer remedy raises none of the problems under §703(h) which might be presented by a radical restructuring of the separate seniority lists, see Patterson v. American Tobacco Co., 535 F.2d 257, 266-7 (4th Cir. 1976).

An employer's hiring decision may not affect the bona fides of a seniority system per se, as the Southern Conference argues (Br. 26), see Franks v. Bowman Transportation Co., supra, 47 L.Ed.2d at 458. But such discrimination does make application of seniority rules to victims of exclusionary hiring practices discriminatory, id. at 458. And a seniority system that discriminates against members of a protected group is by definition not bona fide. Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 517 (E.D. Va. 1968); Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980, 995-6 (5th Cir. 1969), cert. denied 397 U.S. 919 (1970);

94/ The amount of seniority carried over upon transfer would be determined by the "qualification date" formula announced in Bing v. Roadway Express, Inc., 485 F.2d 441,

United States v. Bethlehem Steel Corp., 446 F.2d 652, 658-9 (2nd Cir. 1971).

With considerable audacity, the unions argue that the dual seniority system of the trucking industry is lawful, even though the analytically indistinguishable systems of all other industries have been repeatedly held illegal. In effect they invite this Court to overrule caselaw now settled in all circuits, which this Court has repeatedly refused to review: the progeny of seminal decisions in Quarles v. Philip Morris, Inc., supra, and Local 189, United Papermakers and Paperworkers v. United States, supra.[95] This is, of course, not the first case in which defendants try to justify their dual seniority system by claiming that it operates in a unique industry which

451 (5th Cir. 1973) and adopted below in the instant case (505 F.2d at 63-4, App. 105-6).

95/ Defendants' seniority system has the same defects as those in three other cases, from three different industries, in which this Court has dealt with related discrimination practices; in each case the Court of Appeals had correctly analyzed and remedied the seniority problems and defendants had not sought review here. See, e.g., Franks v. Bowman Transportation Co., 495 F.2d 398, 414-17 (5th Cir. 1974), rev'd and rem'd on other issues, 47 L.Ed.2d 444 (1976); Moody v. Albemarle Paper Co., 474 F.2d 134, 137 (4th Cir.

sets it off from other, unlawful systems.[96] But the reasons advanced by the unions for differentiating their seniority system from others just like it are unusually unimpressive.[97]

(i) The Southern Conference and Local 657 stress that the contract seniority rules are neutral on their face. This is immaterial in Title VII litigation:

1973), vac'd and rem'd on other issues, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 420 F.2d 1225, 1230 (4th Cir. 1969), rev'd on other issues, 401 U.S. 424 (1971).

The Court of Appeals decisions in Franks, Moody, and Griggs, like those in Quarles and Local 189 and their progeny, follow the analysis of seniority issues outlined in two leading law review pieces: Cooper & Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 HARV. L. REV. 1598 (1969) and Note, Title VII, Seniority Discrimination and the Incumbent Negro, 80 HARV. L. REV. 1260 (1967).

96/ Cf. United States (Ford) v. United States Steel Corp., 520 F.2d 1043, 1058 (5th Cir. 1975); United States v. Jacksonville Terminal Co., 451 F.2d 418, 454 (5th Cir. 1971), cert. denied 406 U.S. 906 (1972).

97/ Some of the reasons which the unions suggest justify finding their seniority system "bona fide" would appear to pertain more directly to the question of the unions' liability then to that of the system's legality. These issues are discussed in the following section at pp. 102-9, infra.

> Under the Act, practices, procedures and tests neutral on their face and even neutral in terms of intent cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).

(ii) The Southern Conference claims that it has never "used" or "intended" job seniority rules to obstruct the grant of "rightful place" seniority to individuals who are bold enough to complain. This dubious assertion is legally irrelevant. The argument apparently depends on a subjective definition of intention that has no place in Title VII law. See Griggs v. Duke Power Co., supra, at 432. The accepted meaning of "intent" in Title VII is simply, "that the defendant meant to do what he did, that is, his employment practice was not accidental." Robinson v. Lorillard Corp., 444 F.2d 791, 796 (4th Cir. 1971), cert. dismissed, 404 U.S. 1006 (1971); Griggs v. Duke Power Co., 401 U.S. at 432. The effect of unit seniority is to prevent minority city drivers from moving to road jobs; this constitutes a Title VII violation.

(iii) Both union petitioners emphasize that the separate seniority units allegedly were not initially created for the purpose of excluding minorities (although they subsequently had that effect). This factor does not distinguish this system from others routinely found unlawful. Even in cases where the discriminatory system had been imposed by earlier federal government action or approved by federal courts, the Quarles-Local 189 analysis applies to invalidate dual seniority systems under Title VII.[98/]

(iv) The Southern Conference finds a significant distinction in the fact that road and city jobs are not tied together by a line-of-progression seniority structure, and that city jobs are not supposedly more menial than road jobs. While city driver jobs pay decent wages, road driver jobs pay more.[99/] Road

98/ See, e.g., United States v. Chesapeake & Ohio Rwy. Co., 471 F.2d 582, 587 (4th Cir. 1973), cert. denied 411 U.S. 939 (1973); United States v. Jacksonville Terminal Co., 451 F.2d at 453-4; Taylor v. Armco, 429 F.2d 498 (5th Cir. 1970); cf. Whitfield v. United Steel Workers of America, 263 F.2d 546 (5th Cir. 1959), cert. denied 360 U.S. 902 (1959).

99/ The Southern Conference admits that "many road drivers nevertheless have an opportunity to earn a larger annual salary than

driver positions are the prestige, sought-after jobs in the industry. The voluminous trucking litigation reflects city driver efforts to open up road driver opportunities—not road driver attempts to move to city runs. In any event, the union's points are distinctions without a difference. Title VII does not allow limitation of minorities to certain jobs, even if they are relatively good ones. Any racial barriers must come down, Griggs v. Duke Power Co., supra, even if there were no demonstrable economic disparity, Swint v. Pullman-Standard Co., 539 F.2d 77, 89-93 (5th Cir. 1976).

The Fifth Circuit's decision correctly applied established caselaw governing the identification and remediation of discriminatory seniority systems. The ETMF-Teamsters seniority system is discriminatory insofar as it would deny to class members previously excluded from road driver positions an oppor-

that paid to city employees" (Br. 7). In fact the difference is enormous. In Sagers v. Yellow Freight System, Inc., supra, the average difference for two years was $4,918 and $3,632 (529 F.2d at 726 n. 7). Yellow Freight's pay rates were governed by the same Southern Conference contracts as ETMF's. In the government's ETMF case, the company stipulated that

tunity to transfer with appropriate carry-over seniority. To that extent, it is not protected by §703(h).

The Fifth Circuit did not, as the Southern Conference claims, assume or find that every individual minority city driver had been injured by the existence of the dual seniority system. Nor did it order all such persons transferred to road jobs or fault petitioners for failing to achieve such transfers, as the Southern Conference alleges. Rather, the Court of Appeals held that petitioners' seniority arrangements discriminate against the class as a whole and deny class members a chance to seek road driver positions. It ordered only that individual class members who wish to transfer be given a chance to bid and qualify under non-discriminatory standards (505 F.2d at 62; App. 102-4). None of the defendants will lose the opportunity to prove at Stage II that any individual is not entitled to relief. But the detailed evidence going to those individual determinations is not, and should not be, an element of prima facie proof that the seniority system operates to discriminate against the class as a whole.

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in each of three years road drivers out-earned city drivers by $3,000 to $5,000. See p. 290 of Exhibit cited at n. 66, supra.

IV. THE UNIONS ARE LIABLE FOR THEIR PRACTICES OF DISCRIMINATION AGAINST THE CLASS AND FOR ACQUIESCING IN THE EXCLUSION OF MINORITY CITY DRIVERS FROM ROAD JOBS.

A. The Unions Did Nothing to Assist Plaintiffs or Other Minority City Drivers To Obtain Road Driver Positions

Although the named plaintiffs and other minority city drivers repeatedly sought assistance from the union defendants in obtaining road driver jobs, none was forthcoming. The named plaintiffs testified that they made repeated efforts to communicate to Local 657 their inability and desire to obtain transfer opportunities to go from city driving in San Antonio to road driving at an ETMF terminal; Plaintiffs Jesse Rodriguez, (App. 119-20), Modesto Herrera (App. 125-7) and Sadrach Perez (App. 136, 244) all testified as to personal requests they made to Local 657 President Ray Shafer and other union officials.[100/] Shafer's usual response to these

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100/ Some of these contacts began as early as 1965-6 (App. 125, 136). Most were triggered by the 1970 merger into ETMF of Valley Copper State, another trucking company which had a small San Antonio road operation (App. 126, 119).

inquiries was to state that transfer was impossible because of the separate seniority lists for road and city drivers (App. 126, 136). He also contacted ETMF's vice president in charge of industrial relations following plaintiffs' 1969 and 1970 inquiries (App. 252, 195). The responses Shafer relayed from ETMF were that the ETMF terminal manager in San Antonio should not advise city drivers there of vacancies elsewhere (App. 252-3), and that if ETMF decided to domicile road drivers in San Antonio, it would consider local city drivers for those positions (App. 193). This answer was of course unresponsive to plaintiffs' inquiry, since there were no road driver slots at San Antonio. There is no evidence that Local 657 made any further efforts to help any San Antonio city driver obtain a road job. Indeed, the record reflects Local 657's continuing position that the dual seniority system is immutable and no seniority carryover can be allowed.

In addition, on December 1, 1970, Plaintiff Perez and five other Mexican American city drivers wrote a letter to Frank Fitzsimmons, President of the International

Brotherhood of Teamsters, stating,

> One of the things that we are unhappy with is that all of the long haul drivers who make real good money are Anglo and not Mexican Americans or Blacks.

(App. 327)[101/] Fitzsimmons' response, dated December 4, 1970, was to forward a copy of his correspondence to the Vice President and Area Director of the Southern Conference of Teamsters in Dallas, Texas, for his attention (App. 330). The record does not disclose any action taken by the Southern Conference on this complaint. On the contrary, the only deviations from the no-transfer rules permitted by the Southern Conference have benefitted Anglo drivers almost exclusively. Thus, under the Southern Conference- wide bumping provisions for road drivers (see p.10 n.9), an Anglo road driver can transfer with full seniority over 1000 miles from Atlanta to San Angelo, but a city driver from San Antonio cannot move the 241 miles to San Angelo.

101/ Perez had also repeatedly complained to Shafer and other Local 657 officials about ETMF's discriminatory refusal to consider him for a road position (App.244-50).

And the 1972 transfer opportunity for some city drivers brought no relief to most of ETMF's minority drivers, or anyone in the Local 657 jurisdiction.[102/]

The unions' discriminatory actiors and omissions in this case are not, therefore, limited to being parties to collective bargaining agreements which locked city drivers out of road positions. The unions a.e also implicated in ETMF's exclusionary road driver hiring practices to the extent that they were a referral source for applicants (see p.13, supra). There is no indication that minority road applicants were ever referred. The unions had long years of notice of the complaints of minority city drivers, but offered no relief. The total record of their conduct leaves no doubt that they consistently advanced the interest of Anglo members, and ignored the aspirations of Mexican American and Black members.

102/ See pp.75-76 supra. The 1972 transfer plan was approved by the same individual- Mr. Murray Miller, IBT Vice President and Area Director of the Southern Conference- to whom IBT President Fitzsimmons had referred plaintiffs' letter seeking assistance in securing road driver opportunities (App. 230-1). Mr. Murray did not question the exclusion of all

B. Both Local 657 and the Southern Conference Are Liable For the Discrimination Practiced Against the Class.

Each union defendant urges that, even if some other party discriminated against minority city drivers, it should not be held responsible. Thus, the Southern Conference emphasizes that ETMF was solely responsible for hiring (Br. 18, 31) and for the no-transfer rule (Br. 9, 19)--even though the latter may have been no more than a reformulation of the consequences of the dual seniority system, see n. 84, supra. Local 657 also blames ETMF for the hiring and no-transfer policies (Br. 7, 18-19, 21, 23-4). It also asserts that it has never been party to a contract covering road drivers and has no power to negotiate any area-wide contracts (Br. 9-10, 19-20).[103/]

The unions' efforts at blame-shifting should not deflect attention from two basic facts: all defendants are amply implicated in the creation and maintenance of discrimina-

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drivers at city-only terminals, including over three-quarters of ETMF's minority city drivers (App. 231).

103/ While Local 657 refrains from pointing a finger toward the Southern Conference, the latter, as well as ETMF, would appear to be the logical target of its reasoning.

tory employment systems, and all are necessary and proper parties for purposes of relief. The extent to which the Southern Conference is responsible for the imposition and enforcement of rules restricting access to road driver jobs can hardly be overemphasized. Collective bargaining and indeed all labor-management relations in the long-haul trucking industry are subject to the powerful influence the International Brotherhood of Teamsters. The IBT maintains tight control over regional and local practices through a highly centralized internal union structure and collective bargaining arrangements. In bargaining for and enforcing contracts, the IBT operates through subordinate bodies at the conference level; the Southern Conference is one of these. The Teamsters' inter-union relationships and their bargaining procedures are accurately described in detail in Sagers v. Yellow Freight System, Inc., supra, 529 F.2d at 737, United States v. Navajo Freight Lines, supra, 525 F.2d at 1321-2, and Freeman v. Motor Convoy, Inc., supra, 409 F. Supp. at 1109-10.[104/]

104/ The Fifth Circuit summarized them in this case as well, see 505 F.2d at 60; App. 72.

In light of these facts, it is appropriate to hold all the union entities liable for their mutually-created systemic discrimination practices, and subject them all to injunctive remedies.[105/] Without a finding of discrimination on the part of all defendants, the court on remand might lack the basis for awarding the complete relief to which plaintiffs are entitled.

C. The Unions Breached Their Duty to Act Affirmatively to Protect the Rights and Interests of Minority Employees.

Title VII reinforced and expanded earlier legal authority which requires unions to take an active role in promoting equal employment

105/ The relative degree of fault or responsibility of the defendants is pertinent only to apportionment of monetary liability, including back pay. Consideration of that issue would be premature, since the Fifth circuit did not determine or find any monetary liability at this stage. Cf. Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1381-2 (5th Cir. 1974); United Transportation Union, Local Union No. 974 (Rock) v. Norfolk & Western Railway Co, 532 F.2d 336, 341-2 (4th Cir. 1975), cert. denied 48 L.Ed. 2d 175 (1976).

opportunities for minority members and other employees.[106] Unions must do more than avoid overtly discriminatory actions. Title VII does not allow them to accept passively the discriminatory practices of employers with whom they bargain. Macklin v. Spector Freight System, Inc., 478 F.2d 979, 989 (D.C. Cir. 1973). Accord: Patterson v. American Tobacco Co., supra, 535 F.2d at 270; Carey v. Greyhound Bus Co., Inc., 500 F.2d 1372, 1379 (5th Cir. 1974).

The union petitioners' actions in maintaining and defending their dual seniority system, failing to insist on modification of ETMF's no-transfer rule, and resisting plaintiffs' attempts to gain road driver jobs fall far short of these standards. The unions have preserved intact the systemic policies which bar approximately 200 minority city drivers in Texas from ever having had an opportunity to drive over the road. The Southern Conference's claim to have made a late conversion to the principle of "rightful place" seniority rings hollow. Initially, it

106/ See, e.g. Steele v. Louisville & Nashville R. Co., 323 U.S. 192 (1944); Ford Motor Co. v. Huffman, 345 U.S. 330, 337 (1953).

contradicts positions of uncompromising opposition to any relief for any minority city drivers taken by it and other Teamsters unions in years of previous litigation[107] and in this litigation-- up to the Supreme Court stage. More important, the Teamsters would drastically limit the availability and impact of "rightful place" seniority by subjecting persons who seek it to virtually insuperable barriers of proof. The Teamsters would condition awards of "rightful place" seniority upon proof that the individual performed the futile act of specifically applying for a road position, and would make him prove the existence of his qualifications and a specific vacancy, often at a distant-past time. Cf. Thornton v. East Texas Motor Freight, 497 F.2d 416 (6th Cir. 1974). The unions propose that all this proof would be part of plaintiffs' prima facie case. Under such standards, trucking industry plaintiffs would rarely prevail, and never on behalf of an entire class. That result is, of course, the unions' underlying interest.

107/ The Teamsters, including the Southern Conference, have probably been sued and beaten under Title VII more often and more widely than

Far from seeking to assure equal opportunities, the unions continue to thwart them, This Court should hold them liable for failing to discharge their affirmative obligations.

D. The Unions Show No Valid Reason to Excuse Them From Liability For the Discriminatory Practices.

The reasons advanced by the unions in an effort to avoid liability for their discriminatory practices are invalid. Each is at best a lame excuse that is not legally cognizable.

1. The NLRA obligations of Local 657.

Local 657 argues that the National Labor Relations Act, as amended, 29 U.S.C. §151 et seq. (hereinafter NLRA), bars the union from singularly effecting change in national and regional collective bargaining agreements. Therefore, Local 657 contends, it should not be held liable for failing to effect some type of seniority carryover to eliminate the continuing effects of discriminatory hiring practices (Local 657 Br. 14-20).

Local 657 in effect argues that its NLRA

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any other union in the country. Until recently, its uniform position was that there was no discrimination and no need for any relief.

responsibilities superceded its Title VII obligations, and in support of its position cites Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50, 73 n. 26 (1975) (hereinafter "Emporium Capwell"), Local 657 Br. 20. The local's quotation truncates that crucial footnote, omitting the following language:

> Since the Senator's remarks were directed to the suggestion that enactment of Title VII would somehow constrict an employee's access to redress under other statutory regimes, we do not take them as foreclosing the possibility that in some circumstances rights created by the NLRA and related laws affecting the employment relationship must be broadened to accomodate the policies of Title VII.

(emphasis supplied) The Policy basis of Emporium Capwell is directly contrary to Local 657's position. Reaffirming a statement first make in Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974), this Court wrote:

> Plainly, national labor policy embodies the principles of nondiscrimination as a matter of highest priority,... and it is a commonplace that we must construe the NLRA in light of

> of the broad national labor policy of which it is a part.

420 U.S. at 66.

Local 657 asserts in several ways that, because of NLRA obligations, its hands were tied. It opines that it could not unilaterally modify the collective bargaining agreement, that ETMF would never have agreed to changes the unions might have proposed, and that Local 657 was bound to the system negotiated for it by the Southern Conference and the IBT negotiating committee. These arguments ignore the local's responsibility to advance and represent the interests and minority members, under both the NLRA and Title VII, see Local 12, United Rubber Workers v. NLRB, 368 F.2d 12, 16-24 (5th Cir. 1966), cert. denied 389 U.S. 837 (1967) Guerra v. Manchester Terminal Corp., 498 F.2d 641, 650-1 (5th Cir. 1974). Although it might not have succeeded, Local 657 and the Southern Conference were obligated to try to obtain suitable seniority modifications that would permit minority city drivers in San Antonio to transfer to road driving jobs.[108] The asserted fact that ETMF might

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108/ Local 657's reliance on NLRB v. Wooster Division of Borg-Warner Corp., 356 U.S. 342 (1958), is misplaced. Borg-Warner holds that although one party may not insist on a matter outside the coverage of the NLRA, bargaining need not be so confined, 356 U.S. at 349. While rights to jobs outside Local 657's jurisdiction may not have been mandatory subjects for bargaining under the NLRA, Title VII imposed reciprocal obligations on the unions and ETMF to negotiate access to those jobs for minority members of Local 657 who were victims of discrimination.

not have agreed to any modifications to the collective bargaining agreement to permit such transfers is both speculative and not dispositive as to union liability. Plaintiffs have never insisted on unilateral abrogation of seniority provisions or of negotiating authority; they maintain that all parties were obligated to agree on appropriate remedial measures. But since all the parties to the bargaining failed to accommodate their agreement to law, all are jointly liable, Emporium Capwell, supra, 420 U.S. at 69-70; Robinson v. Lorillard Corp., supra, 444 F.2d at 799.[109]

109/ If inability to effect unilateral changes were a complete defense, then no party could be held liable for the discrimination. This anomalous result is unacceptable.

2. Discriminatory preferences of union members.

Both union defendants raise the purported preference of union members for the discriminatory seniority system as grounds for relieving the unions of liability (So. Conf. Br. 32, Local 657 Br. 18, 22). Local 657 ties this argument to its NLRA defense. But in any context, the preferences of union members, even if they represent a majority of the affected employees,[110/] cannot validate a discriminatory seniority system:

> "If relief can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed."

Franks v. Bowman Transportation Co., Inc., supra, 47 L. Ed.2d. at 468, quoting United States v. Bethlehem Steel Corp., supra, 446 F. 2d at 663. Moreover, the unions direct their arguments against a hypothetical target.

110/ This is not the case here. In neither the Southern Conference region nor Local 657 do minority city drivers of ETMF form a majority. And at the national level, where the contracts are fashioned, minority city drivers' particular interests are insignificant.

Respondents do not seek, and the Fifth Circuit did not order, a merger of the separate units or any such broad transfer rights as were discussed at the post-trial membership meeting of Local 657.[111/]

Unions are bound to accommodate the preferences of their members to legal requirements. Robinson v. Lorillard Corp., supra, 444 F.2d at 799. To do so is not "reverse discrimination", but compliance with the law.

3. Other reasons advanced by the unions.

Both union petitioners attribute some significance to plaintiffs' failure to seek their remedy through the formal contract

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111/ The minutes of the "special meeting" of freight line members of Local 657 on February 11, 1973 show the distortion of a proposal for implementing Article 37 and 38 (non-discrimination) in the contract to provide for transfer from the city to the road. During discussion, Local 657 President Shafer expanded the limited proposal into a system-wide seniority change requiring merger of all contracts into one (App. 49, 50). The proposal was thus easily defeated. The alternative of a trial transfer was likewise posed as one without any carryover seniority. (App. 52) The minutes tend to confirm that the post-trial (but pre-decision) meeting was a litigation ploy.

grievance machinery or otherwise to complain to the union about its seniority system. Apart from its futility, such resort is irrelevant here. There are only two procedural prerequisites to filing a Title VII suit; both are prescribed in §§706(a), (e) of the statue, 42 U.S.C §§2000e-5(a), (e), McDonnell-Douglas Corp. v. Green, supra, 411 U.S. at 798. Complaining to a defendant party through internal grievance procedure is not one of them. Title VII remedies are independent of and additional to any available grievance-arbitration procedures, Alexander v. Gardner-Denver Co., supra, 415 U.S. at 48-49.

Both unions also make much of the fact that Teamsters locals, including 657, have not been segregated. But the presence of segregated locals does not justify racist practices. Some industires characteristically had segregated local unions; others, among the worst in terms of employment discrimination, developed different patterns of racial exclusion. The legal difference is not significant. A union that maintains

"integrated" locals [112/] and is party to discriminatory practices violates §703(c)(2) of Title VII, 42 U.S.C. §2000e-2(c)(2).

In sum, both unions pose as innocents, who neither knew anything was wrong, not could have done anything about it if they had. More implausible posturing by Teamsters unions is hard to imagine, see n. 107, supra. This Court should cut through the various smoke-screens thrown up by the unions and should implement Congress's purpose in enacting Title VII, by holding defendants accountable for the discriminatory effects of their intentional practices.

112/ The union petitioners claim that Local 657 is "controlled" by minorities (Southern Conf. Br. 29). While Mexican Americans and Blacks may be in the majority at the local level, the Teamsters' extraordinarily centralized collective bargaining contracts and negotiating procedures, see p. 98, infra, deprive the unions' point of much significance.

V. THE DISTRICT COURT ERRED IN PREMATURELY EVALUATING PLAINTIFFS' QUALIFICATIONS AND IN USING IMPROPER STANDARDS FOR THAT EVALUATION.

A. The District Court Erred in Reviewing Plaintiffs' Qualifications Even Though ETMF Never Considered Their Applications.

It was error for the district court to pass on plaintiffs' qualifications when the company had never considered them in determining plaintiffs' eligibility for road jobs. Until litigation commenced, ETMF refused to consider plaintiffs' applications on racially tainted grounds without even reviewing their qualifications, even by purported company standards.

For many years, plaintiffs were virtually prevented from filing formal written applications. During this time, they repeatedly approached both union and company officials regarding transfer.[113/] Every

113/ With regard to contact with union officials, see pp. 14-15, 93-5, supra. Plaintiffs also spoke to many company officials about transfer. For example, Mr. Rodriguez spoke with Ezra Beierle, an employee in the management division, shortly after the 1970 merger with VCS (App. 118, 120, 285). Mr. Perez spoke repeatedly with Mr. Truitt, an

person plaintiffs contacted told them that the no-transfer rules prevented consideration of their requests for transfer. In 1970, shortly after ETMF's merger with Valley Coperstate System (VCS), plaintiffs' requests became more persistent (App. 120, 268, 273, 244, 251). But since ETMF continued to refuse consideration of plaintiffs' applications, plaintiff Rodriguez ultimately filed charges with the EEOC on August 20, 1970 (App. 318). The next day, plaintiffs and Mr. Gomez were called into the terminal manager's office to sign company-prepared letters of application for road jobs (App. 324-7, see App. 268-9). Yet, ETMF even then refused to consider or properly evaluate plaintiffs at all. Normal procedure would have required that their written applications be forwarded to Dallas for initial consideration, where ultimate road driver hiring decisions are made (see p. 12, supra). However, plaintiffs' written applications were filed away in San

ETMF terminal agent, and to Mr. Sager, the San Antonio terminal manager (App. 240-1, 268-9). In 1965, Mr. Herrera asked Mr. Asbury, then terminal manager at Dallas, both for a road job and about the application procedure (App. 290-1).

Antonio and were not forwarded to Dallas until six months later, after the start of the EEOC investigation of plaintiffs' allegations that ETMF excluded minorities from road driver positions (App. 318-321).

Even after the Dallas office finally received plaintiffs' applications, they still received no consideration based on their qualifications. Mr. Maier testified at trial that he merely "reviewed" plaintiffs' applications in a very cursory fashion since he

> saw that under the circumstances that they were not in a position as such that we would consider their applications. They were city drivers and the policy has already been testified to, it is a no-transfer policy.

(App. 190)[114/] Maier also testified that even if the applications had been sent promptly to Dallas, "nothing would have changed because of our policy that was established does not allow for transfer"(App. 191).

Thus, it is clear from the defendant's

114/ Mr. Maier also testified that he considered this studied neglect to be "appropriate action" in his capacity as affirmative action coordinator. (App. 190)

inaction on the applications and the ultimate rejection of plaintiffs based merely on their status as city drivers that ETMF never considered their ability to perform as over-the-road drivers. Despite this admitted fact, at trial ETMF defended on the grounds that plaintiffs were poorly qualified. In preparation for trial, ETMF went to great lengths to compile evidence that named plaintiffs had poor accident and injury records in order to legitimize their rejection. The fact that the great bulk of company charges and complaints against plaintiffs followed their written transfer requests and the filing of EEOC charges in late August 1970 strongly suggests that that evidence was at best pretextual, cf. McDonnell-Douglas Corp. v. Green, supra, 411 U.S. at 803-5.[115/]

Throughout trial, plaintiffs objected to this line of testimony and the court's admission of evidence on plaintiffs' qualifi-

115/ For example, testimony with respect to plaintiffs' allegedly poor work performance was specifically limited to the post-1970 period (App. 158-9). And, of the eight incidents on which the district court relied, at ETMF's urging, to find plaintiff Perez unqualified, only one is alleged to have occurred during the first eleven years of his

cations on the grounds that the issue was not before the court since the company never gave any consideration to plaintiffs' qualifications (Tr. 18, App. 122).[116] The court overruled these objections. Furthermore, the district court erroneously accepted ETMF's evidence in making its determinations (App. 64). See part B, pp.116--120, infra. The Court of Appeals held those determinations "premature" and aptly observed, "The question with regard to the named plaintiffs is not whether they were qualified, but whether ETMF's failure to consider their application was discriminatory," 505 F.2d at 63; App. 104.

The Fifth Circuit's decision is logical and consistent with similar decisions by other

employment; the other seven followed in rapid succession in the eight months after August 1970 (App. 61-3). Furthermore, the only two warning letters ever received by Mr. Rodriguez for any alleged incidents were both given in 1971—after the Dallas office learned that plaintiffs had filed EEOC charges (App. 123, 321).

116/ The Fifth Circuit's construction (505 F.2d at 52; App. 82) of plaintiffs' stipulation as to the issues for proof at trial (App. 115 ¶8, 419 ¶8) is consistent with these objections. Cf. p. 32, supra.

appellate courts. See, e.g., Young v. Edgcomb Steel Co., 499 F.2d 97 (4th Cir. 1974);[117] East v. Romine, Inc., 518 F.2d 332 (5th Cir. 1975);[118] and Muller v. United States Steel Corp., 500 F.2d 923 (10th Cir. 1975).[119] Each of these decisions views with appropriate suspicion the post-facto "qualifications" reasons advanced by employers in Title VII litigation, when the company's earlier rejection was based

117/ In Young, the employer had denied plaintiff promotion on the basis of his performance on an unlawful test. At trial the employer advanced a different reason for the denial, which the company had not previosuly considered. The Fourth Circuit held that it was error to find plaintiff unqualified on the basis of the second reason.

118/ Ms. East, a welder, was denied a job in part because of information obtained when Romine checked her background with other employers. But Romine did not similarly check the backgrounds of male welder applicants hired in her place. The Fifth Circuit held that, in the absence of such checks, the district court erred in relying on the reasons asserted by Romine for rejecting East, see 518 F.2d at 339-40.

119/ In Muller, the Tenth Circuit affirmed a judgment finding discrimination where the employer had not considered Muller for a promotion he sought and where the lack of objective criteria for the position precluded any determination that others were more qualified than Muller. 509 F.2d at 929.

on completely different reasons or on standards not ordinarily utilized.

Whether plaintiffs are actually qualified as road drivers remains to be determined under proper standards. But the record conclusively shows that the summary rejection of their applications was discriminatory.

B. It Was Improper to Evaluate Plaintiffs Under Standards Which ETMF Did Not Require Anglo Road Drivers to Meet.

Even if the district court could properly have reviewed plaintiffs' qualifications as road drivers—despite ETMF never having done so—it erred in applying ETMF's announced standards for hiring. Those standards were purely theoretical: ETMF did not adhere to them when it hired Anglo road drivers.

The district court accepted ETMF's assertions as to its hiring standards at face value. Those purported standards were: a 27 year minimum age, an acceptable weight range, high school education or equivalent, good driver safety record, and three years "immediate prior" road driving experience (Pl. Ex. 28, p.29). The district court focused on plaintiffs'stipulation that those standards were not in themselves discriminatory (since they were neutral on their face) (App. 59). But

as the Fifth Circuit noted with respect to the experience element of these standards,[120] plaintiffs' stipulation should not be read to have waived their claim that application of these criteria to them was discriminatory (505 F.2d at 59, App. 96-7).

The district court's reliance on the inability of plaintiffs to meet "all of the qualifications for a road driver position according to the company manual due to age or weight or driving record" (App. 64) overlooks the fact that many successful Anglo applicants did not satisfy the same company manual standards. Plaintiffs' counsel read into the record at trial the names of 12 such individuals, hired after the filing of plaintiffs' written applications, who did not have the supposedly requisite amount of education (App. 181), and identified other Anglos whose poor driving records, including serious accidents, did not measure up to the safe driving record standard (Tr. 291-3, not reproduced in Appendix).[121]

120/ The Fifth Circuit analyzed the three years' experience requirement at length and correctly concluded that as applied to minority city drivers it was unlawful. 505 F.2d at 58-59, 62; App. 95-97; 102.

121/ The road driver applications of these persons are in the record. A number of attach-

Moreover, as previously noted, the more extensive Justice Department investigation of ETMF's hiring practices revealed scores of instances in which applicants unqualified by announced standards were hired, see p. 62 ¶iv, supra. And Judge Hughes specifically found in United States v. East Texas Motor Freight, supra, that the company had failed to follow each of its purported standards in many instances, see pp. 11-12, supra.

Even if ETMF had used these criteria as reasons for denying plaintiffs' applications—and it did not, except in the litigation phase, see part A, supra—it would have violated Title VII in doing so. It is basic Title VII law that an employer may not require minority applicants to meet higher or different qualification standards than similarly situated whites. See, e.g., EEOC Guidelines on Employee Selection Procedures, 29 C.F.R. §1607.11 (1970).[122/] This Court recognized that prin-

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ments to plaintiffs' exhibit 28, the White deposition, are also applications of Anglos hired as road drivers who did not meet the purported standards.

122/ This section of the guidelines, to which this Court gives deference, Albemarle Paper Co. v. Moody, supra, 422 U.S. at 431, states:

ciple when, in remanding Franks v. Bowman, supra, it emphasized that class members' qualifications for road driver jobs had to be evaluated "under nondiscriminatory standards actually applied by Bowman to individuals who were in fact hired", 47 L.Ed.2d at 466 n. 32 (emphasis in original). Application of disparate standards such as those prevalent at ETMF is an unlawful employment practice, see Griggs v. Duke Power Co., supra, 420 F.2d at 1231, and Watkins v. Scott Paper Co., supra, 530 F.2d at 1179 n. 28—at least in the absence of a compelling "business ne-

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> No employee selection standard can be imposed upon a class of individuals protected by Title VII who, but for prior discrimination, would have been granted the opportunity to qualify under less stringent standards previously in force.

The Fifth Circuit in Watkins v. Scott Paper Co., supra, 530 F.2d at 1178 n. 27, perceptively observed that:

> This guideline does not require that the affected class member show that he would have been able to qualify in the absence of discrimination; it requires only that he show that he lost the opportunity to qualify.

(emphasis in original)

cessity" for the disparity.[123/] The district court committed clear error in adopting ETMF's unequally applied standards as guidelines for its decision.

Although the Fifth Circuit did not reach the argument presented in this section, it had similar concerns in mind when it admonished the trial court to "supervise carefully the standards used by ETMF to determine whether the plaintiffs are in fact qualified" (505 F.2d at 63, App. 104). While the evidence clearly shows that ETMF did not follow the standards contained in its own manual, the record is not fully enough developed to permit determination of what, if any, standards were in fact followed. Since the district court's review of plaintiffs' qualifications was premature, further proceedings are required on remand, see part A, supra. The record may be completed at that time. At present, it suffices to conclude that the district court erred in its unquestioning acceptance of ETMF's paper criteria for road

123/ There can be no question of any such business necessity here, because ETMF has waived the standards repeatedly even during the pendency of this lawsuit. See pp. 11-12, supra, and App. 427-8, 431-3.

driver hiring. It should have concluded, as the Fifth Circuit did, that ETMF's refusal to consider plaintiffs' applications pursuant to defendants' no-transfer and seniority rules unlawfully deprived plaintiffs of employment opportunities.

CONCLUSION

For the reasons stated in this brief, this Court should affirm the judgment of the Court of Appeals for the Fifth Circuit.

DATED: October 15, 1976.

Respectfully submitted,

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FOR ARGUMENT

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Nos. 75-651, 75-715, 75-718

In the Supreme Court of the United States

OCTOBER TERM, 1976

TEAMSTERS LOCAL UNION 657, PETITIONER

v.

JESSE RODRIGUEZ, ET AL.

SOUTHERN CONFERENCE OF TEAMSTERS, PETITIONER

v.

JESSE RODRIGUEZ, ET AL.

EAST TEXAS MOTOR FREIGHT SYSTEM, INC., PETITIONER

v.

JESSE RODRIGUEZ, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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INDEX

	Page
Interest of the United States and the Equal Employment Opportunity Commission	1
Statement	3
Summary of argument	6
Argument	7
Conclusion	18

CITATIONS

Cases:	
Arkansas Education Ass'n. v. *Board of Education*, 446 F. 2d 763	12
Barnett v. *W. T. Grant Co.*, 518 F. 2d 543	13
Blackie v. *Barrack*, 524 F. 2d 891	14
Bowe v. *Colgate-Palmolive Co.*, 416 F. 2d 711	12, 15
Caldwell v. *Craighead*, 432 F. 2d 213, certiorari denied, 402 U.S. 953	11
Carey v. *Greyhound Bus Co., Inc.* 500 F. 2d 1372	12
Castro v. *Beecher*, 459 F. 2d 725	8
Cypress v. *Newport News General & Nonsectarian Hospital Ass'n.*, 375 F. 2d 648	12
Davis v. *Romney*, 490 F. 2d 1360	9
Franks v. *Bowman Transportation Co.*, 424 U.S. 747	10
Garrett v. *City of Hamtramck*, 503 F. 2d 1236	8
Gonzales v. *Cassidy*, 474 F. 2d 67	13
Graniteville Co. v. *Equal Employment Opportunity Commission*, 438 F. 2d 32	12
Jackson v. *Lynn*, 506 F. 2d 233	9
Jimenez v. *Weinberger*, 523 F. 2d 689	15
Johnson v. *Goodyear Tire & Rubber Co.*, 491 F. 2d 1364	14–15
Lau v. *Nichols*, 483 F. 2d 791	8
Locke v. *Board of Public Instruction, Palm Beach County*, 499 F. 2d 359	11

226-096—76——1

Cases—Continued

	Page
Mack v. *General Electric Co.*, 329 F. Supp. 72	14
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792	9
Penn v. *San Juan Hospital*, 528 F. 2d 1181	13
Reed v. *Arlington Hotel Co.*, 476 F. 2d 721, certiorari denied, 414 U.S. 854	12, 14
Robinson v. *Lorillard Corp.*, 444 F. 2d 791	15
Senter v. *General Motors Corp.*, 532 F. 2d 511	8, 12
United States v. *East Texas Motor Freight System, Inc.*, 10 EPD ¶ 10, 345, 10 FEP Cases 971	2, 3, 16–17
United States v. *Lee Way Motor Freight, Inc.*, 7 EPD ¶ 9066, 7 FEP Cases 710	2
Universal Athletic Sales Co. v. *Salkeld*, 511 F. 2d 904	11
Wetzel v. *Liberty Mutual Insurance Co.*, 508 F. 2d 239, certiorari denied, 421 U.S. 1011	12, 13, 14
Wulff v. *Singleton*, 508 F. 2d 1211	11

Statutes and rules:

Civil Rights Act of 1866, Section 1, 14 Stat. 27, 42 U.S.C. 1981	3, 5
Civil Rights Act of 1964, Title VII, 78 Stat. 253, as amended, 42 U.S.C. (Supp. V) 2000e *et seq*	*passim*
Section 706(f)(5), 42 U.S.C. (Supp. V) 2000e-5(f)(5)	11
28 U.S.C. 2106	11
Fed. R. Civ. P.:	
Rule 23(a)	5, 13
Rule 23(a)(1)	12
Rule 23(a)(2)	12
Rule 23(a)(3)	13
Rule 23(a)(4)	14
Rule 23(b)(2)	5, 11, 14, 15

Miscellaneous:

Executive Order 11246, 30 Fed. Reg. 12319	2
Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39 (1967)	8
7 Wright & Miller, *Federal Practice and Procedure*, § 1764 (1975 Pocket Part)	13
7A Wright & Miller, *Federal Practice and Procedure*, § 1785 (1972)	8–9

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

INTEREST OF THE FEDERAL AMICI CURIAE

The United States and the Equal Employment Opportunity Commission (EEOC) are charged with en-

forcement responsibilities with respect to discrimination in employment under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. (Supp. V) 2000e *et seq.*[1] Pursuant to this authority, the government has processed numerous charges of discrimination implicating trucking industry practices similar to those challenged in this case.[2] The failure to assign minorities to line driver positions, and the existence of company policies and collective bargaining agreements which perpetuate such assignment discrimination are practices common to all Title VII trucking industry litigation.

Subsequent to the filing of this private litigation, the United States initiated a nationwide pattern and

[1] Although the Attorney General's authority to initiate Title VII suits against private employers has been transferred to the Equal Employment Opportunity Commission, the United States continues to participate in trial and appeal of some of those cases it initiated and as *amicus curiae* in cases involving issues of general importance to the enforcement of Title VII. Moreover, the Attorney General has authority to enforce Executive Order 11246, 30 Fed. Reg. 12319, which prohibits discrimination in employment by federal government contractors.

[2] Suits brought by the government against the trucking industry include *United States* v. *East Texas Motor Freight System, Inc.*, 10 EPD ¶ 10,345, p. 5415, 10 FEP Cases 971 (N.D. Tex.), appeal docketed, No. 75–3332, C.A. 5; *United States and Equal Employment Opportunity Commission* v. *Trucking Employers Inc.*, C.A. 74–453 (filed March 20, 1974, D. D.C.); *United States and Equal Employment Opportunity Commission* v. *Interstate Motor Freight System*, C.A. G137–72 (filed May 11, 1972, W.D. Mich.); *United States and Equal Employment Opportunity Commission* v. *Strickland Motor Freight*, C.A. 3–5394–A (filed December 23, 1971, N.D. Tex.); and *United States* v. *Lee Way Motor Freight, Inc.*, 7 EPD ¶ 9066, 7 FEP Cases 710 (W.D. Okla.).

practice suit against petitioner East Texas Motor Freight. Most of the relief was secured by consent decree; however, issues of proper transfer and seniority relief are currently in litigation before the Court of Appeals for the Fifth Circuit.[3] *International Brotherhood of Teamsters and T.I.M.E.–D.C., Inc.* v. *United States and Equal Employment Opportunity Commission,* Nos. 75–636 and 75–672, pending in this Court, also involves several issues present in this case, including questions of proof of job assignment discrimination in a suit brought on behalf of a class, the legality of applications of a seniority system which perpetuates that discrimination, and the proper relief to be accorded class members. The resolution of the issues raised in this case and *T.I.M.E.–D.C.* will have a direct effect on the enforcement of Title VII by both the government and private individuals.

STATEMENT

Respondents (plaintiffs below), three Mexican-Americans employed as city truck drivers by petitioner East Texas Motor Freight (ETMF), filed a class action complaint in the United States District Court for the Western District of Texas, alleging that the Company and union defendants violated Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. (Supp. V) 2000e *et seq.*, and Section 1 of the Civil Rights Act of 1866, 14 Stat. 27, 42 U.S.C. 1981, by maintaining policies ~~with~~ which effectively

[3] See *United States* v. *East Texas Motor Freight Systems, Inc.*, *supra.*

prevented Mexican American and black city drivers from obtaining employment in the Company's more lucrative road driver positions (A. 7–19).[4]

Plaintiffs alleged in their complaint that the case was a class action (A. 7–8, ¶2; A. 15, ¶12), and sought class relief (A. 18). In their proposed pretrial order (A. 4) plaintiffs reiterated that they "have requested this court allow the instant proceeding to proceed as a class action" and again asked for class relief. Shortly after the trial began, the court asked plaintiffs' counsel if he maintained that the litigation was a class action and counsel responded in the affirmative (A. 128). The court thereupon stated that it would "keep the question of the class open" (A. 130). Plaintiffs did not move formally for certification as a class action, nor were they required to do so by the local rules (see Resp. Br. 32–33). Similarly, defendants did not move formally to dismiss the class allegation.

Immediately prior to trial, the parties entered into a stipulation "[t]hat the only issue presently before the court pertaining to the company is whether the failure of the defendant, East Texas Motor Freight, to consider plaintiff's line driver applications constituted a violation of Title 7 and 42 USC Section 1981" (A. 115, ¶8). The meaning of that stipulation is contested and remains unclear (see Resp. Br. 32; ETMF Br. 13–14).

After trial was concluded, the district court dismissed the class allegations and decided that the

[4] "A." refers to the joint appendix in this Court.

defendants' actions with respect to the individual plaintiffs had not violated Title VII or Section 1918 (A. 55–67). The district court dismissed the class allegation on the grounds that plaintiffs had failed to move for a prompt determination of the class issue and had "confied the evidence, arguments and post trial brief to the individual claims * * * and * * * stipulated at the commencement of trial that the only issue before this Court with respect to the defendant truck line involved its failure to consider the individual plantiffs' applications for employment as road drivers" (A. 65).

The court of appeals reversed the district court's dismissal of plaintiffs' class allegations and its conclusion that the defendants had not violated Title VII or Section 1981 (A. 68–111). Concluding that the district court had an independent obligation to resolve the class certification issue, the court of appeals held that a class action "may not be dismissed because the class representatives fail to ask for a ruling on the propriety of the class nature of the suit" (A. 77–78). The court of appeals found that the class claims met the requirements of Rule 23(a) and that a proper class was established under Rule 23(b)(2), Fed. R. Civ. P. (A. 76–81).[5] The court ruled that in conformity with the record evidence the appropriate class was all incumbent minority city drivers within the State of

[5] The court of appeals was of the opinion that the case had been tried as a class action. Petitioners and respondents differ on this issue (see Resp. Br. 31; ETMF Br. 24–25). ETMF contends that the lack of any ruling on the class question created "manifest confusion with respect to the status of the litigation" (ETMF Br. 29).

Texas subject to the relevant collective bargaining agreements.[6]

After certifying the class, the court of appeals proceeded to decide the class liability and remedy issues upon the record which resulted from the trial below. The court concluded that the statistics available established a *prima facie* case of class discrimination which ETMF had failed to rebut (A. 84–90). The court also found that the no-transfer rule and separate seniority rosters perpetuated the effects of the discriminatory hiring policy and were not justified by business necessity (A. 90–93). The union defendants, which had negotiated the collective bargaining agreements embodying the separate seniority roster system, were found to have violated Title VII (A. 97–101). Finally, the court provided transfer and seniority relief to affected minority city drivers, including those working at terminals that do not employ line drivers (A. 103–104).

SUMMARY OF ARGUMENT

The court of appeals correctly held that in the circumstances of this case the district court had an independent responsibility to make a class certification decision notwithstanding plaintiffs' failure to file a formal motion for class certification. In addition, the court of appeals permissibly found the record ade-

[6] In the complaint, respondents sought to represent the class of minority applicants for road positions at ETMF within the State of Texas (A. 7–8). The court of appeals found that respondents had not pursued this contention and that it had been properly dismissed (A. 83).

quate to enable it to conclude that a class of incumbent minority city drivers should be certified. This Court should affirm the court of appeals' decision on those two class action questions.

Petitioners request this Court to address additional important questions concerning the standard of proof in a class discrimination case (ETMF Br. 37–55) and the legality of seniority rules in the trucking industry (Teamsters Br. 23–25). We submit that these questions were prematurely decided by the court of appeals, on the basis of a record that was lacking in relevant and available factual information (see pp. 16–17, *infra*), and that the case should be remanded to the district court to be litigated properly as a class action.

ARGUMENT

1. The district court erred in failing to determine the class action issues until after trial was complete, and the court was prepared to rule on the merits. Although plaintiffs failed to move formally for class certification, they clearly presented a class action issue that the court should have determined before trial. The allegations in the complaint, the proposed pretrial order, and the colloquy with plaintiffs' counsel at trial all fairly presented the court with a class action question.[7] Moreover, the nature of

[7] When a witness other than a named plaintiff was called to testify as to company practices, the following colloquy ensued (A. 129–130): "Mr. Weiss [attorney for ETMF]: I would like just to make one further observation with reference to the class. It

plaintiffs' claims necessarily involved class issues. The heart of plaintiffs' case was the claim that the Company's past discriminatory policy of refusing to hire minorities for road positions was being perpetuated by its no-transfer rule and collective bargaining agreement with the unions. In all these circumstances, including plaintiffs' repeated requests for class relief, the court of appeals correctly held that the plaintiffs had not abandoned their class claims.

The court of appeals held that because plaintiffs were asserting a claim for class relief, the district court was obligated to determine the issue of class certification in a timely fashion, even though plaintiffs did not formally move for certification (A. 77–78). This view has been adopted in other appellate decisions and by commentators. See *Senter* v. *General Motors Corp.*, 532 F. 2d 511, 520–521 (C.A. 6); *Garrett* v. *City of Hamtramck*, 503 F. 2d 1236, 1243 (C.A. 6); *Castro* v. *Beecher*, 459 F. 2d 725, 731 (C.A. 1); *Lau* v. *Nichols*, 483 F. 2d 791, 793, n. 4 (C.A. 9); Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 41 (1967); 7A Wright &

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seems to me that he alleged that it should be a class action. All of the defendants denied that it should. I think it was incumbent upon him prior to the trial to have filed a motion to establish that it was a class action."

"The COURT: I agree. But just for this one witness, unless it gets too far out of hand, Mr. Weiss—he is also offering this witness for the limited purpose of showing the general company practice which would coincide and corroborate the testimony of the parties in the case. I am certainly going to allow it for that purpose and I will keep the question of the class open."

Miller, *Federal Practice and Procedure*, § 1785, p. 128 (1972) ("The court has an independent obligation to decide whether an action brought on a class basis is to be maintained even if neither of the parties moves for a ruling under subdivision (c)(1)"). Cf. *Jackson* v. *Lynn*, 506 F. 2d 233 (C.A. D.C.); *Davis* v. *Romney*, 490 F. 2d 1360 (C.A. 3).

Whatever may be the case in other kinds of suits, in actions under Title VII, in which issues relating to class certification are presented, a determination of those issues prior to (or at least during) trial is generally necessary if the case is to proceed properly. As we said in our brief in *T.I.M.E.–D.C.*, the order and allocation of proof in a Title VII case will vary depending upon a number of factors, including whether the claims are individual in nature or are based upon allegations of a pattern and practice of discrimination against a class of minority individuals. While proof requirements may differ depending upon the facts of the particular case, an individual claiming discrimination in a private, non-class action may be required to demonstrate as part of his *prima facie* case that a vacancy existed for which he was qualified and from which he was excluded for racial reasons. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802. By contrast, in a class discrimination suit, once plaintiffs have demonstrated by statistical and other evidence that a pattern and practice of discrimination exists, the burden will be on the defendant to show "that individuals * * * were not in fact

victims of previous hiring discrimination" (*Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 772). Thus, a focal point of the defense in a class suit might well be the inadequacy of the statistical and testimonial evidence of a pattern of discrimination. By contrast, defendants responding to individual claims could in some cases rest, *inter alia,* upon a showing that the individual claimants were not qualified for the relevant jobs. Thus it generally is important for all parties to know at trial what the nature of the litigation is to be so that they can correctly meet the order and allocation of proof required. Failure to provide timely notice of these evidentiary burdens may cause substantial prejudice to the parties, thereby undermining the fairness of the entire proceeding. This interaction between the class determination and the evidentiary burdens in Title VII cases requires district courts generally to resolve class questions prior to trial, and we believe the failure of the district court to do so in the circumstances of this case calls for remanding the case for trial on the class liability issues.

2. Having determined that the district court's denial of certification was improper, the court of appeals properly certified the case as a class action based upon the factual record and the arguments on that issue by counsel for all parties. Although we believe that it was inappropriate for the court of appeals to decide the class liability issues in the present posture of the case, certification of the case as a class action was a proper exercise of the court of appeals' power to ren-

der an appropriate judgment under 28 U.S.C. 2106.[8] Where the pertinent facts appear in the record and the point to be decided is clear, efficient judicial administration makes class certification by the appellate court appropriate. *Wulff* v. *Singleton,* 508 F. 2d 1211, 1214 (C.A. 8).[9] This principle is particularly applicable to a Title VII suit. Although the specific statutory directive that cases brought under the Act should be "in every way expedited" (Section 706(f)(5), 42 U.S.C. (Supp. V) 2000e–5(f)(5)) is directed at district courts, the underlying purpose of the provision is applicable at all stages of the judicial process.

The evidence in the record fully supports the decision of the court of appeals that all of the requirements for a class action under Rule 23(b)(2), Fed. R. Civ. P., were satisfied. Nearly 200 ETMF minority city drivers employed within the State of Texas were included within the scope of the class plaintiffs sought to represent (A. 352–415). This number clearly

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[8] That Section provides: "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

[9] See also *Locke* v. *Board of Public Instruction, Palm Beach County*, 499 F. 2d 359, 365 (C.A. 5); *Universal Athletic Sales Co.* v. *Salkeld*, 511 F. 2d 904, 907 (C.A. 3). Cf. *Caldwell* v. *Craighead*, 432 F. 2d 213, 216 (C.A. 6), certiorari denied, 402 U.S. 953.

satisfies the "numerosity" requirement of Rule 23 (a)(1).[10]

The questions of law and fact presented by this case were also common to all members of the class as required by Rule 23(a)(2). The plaintiffs contended that all terminals denied minorities hired as road drivers and that the Company-wide no-transfer and contract policies perpetuated this hiring discrimination in violation of Title VII.[11] Plaintiffs' case, therefore, was based on the legal effect that uniform Company policies had on similarly situated minority city drivers.[12] Moreover, there is a common question of law as to whether the no-transfer rule and collective bargaining agreement violate Title VII by perpetuating the discrimination in hiring.

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[10] See, *e.g.*, *Carey* v. *Greyhound Bus Co., Inc.*, 500 F. 2d 1372, 1380–1381 (C.A. 5); *Arkansas Education Ass'n.* v. *Board of Education*, 446 F. 2d 763, 765 (C.A. 8); *Wetzel* v. *Liberty Mutual Insurance Co.*, 508 F. 2d 239, 246 (C.A. 3), certiorari denied, 421 U.S. 1011; *Cypress* v. *Newport News General & NonSectarian Hospital Ass'n.*, 375 F. 2d 648, 653 (C.A. 4).

[11] The Company contends that since each terminal is responsible for its own hiring "it is entirely possible that employment policies at one East Texas Motor Freight terminal might be discriminatory while those at another * * * terminal are not" (ETMF Br. 33). The record shows, however, that at the time of the EEOC charge in this case, none of the Company's six road terminals in Texas had ever hired a single minority road driver (A. 113–114). Indeed, this pattern existed at every Company road terminal throughout the country (A. 445). The existence of a common question of fact as to a general hiring policy with respect to road drivers is thus clear.

[12] See *Senter* v. *General Motors Corp.*, 532 F. 2d 511, 524 (C.A. 6); *Reed* v. *Arlington Hotel Co.*, 476 F. 2d 721, 723 (C.A. 8), certiorari denied, 414 U.S. 854; *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711, 719 (C.A. 7); *Wetzel* v. *Liberty Mutual Insurance Co.*, 508 F. 2d 239, 250 (C.A. 3), certioriai denied, 421 U.S. 1011; *Graniterville Co.* v. *Equal Employment Opportunity Commission*, 438 F. 2d 32, 37 (C.A. 4).

Since plaintiffs' claims encompassed those of all other class members, they satisfied the typicality requirement.[13] As city drivers domiciled at a non-road terminal, plaintiffs had to rely on the same legal theory, and were required to prove the same elements of discrimination, which established the rights of city drivers domiciled at road terminals.

Plaintiffs' attorney is qualified, experienced and able to conduct the proposed litigation. The plaintiffs have no interests antagonistic to the class and the interests of the representative and of the class are co-extensive with respect to the elimination of the unlawful policy at issue. See *Wetzel* v. *Liberty Mutual Insurance Co.*, 508 F. 2d 239, 247 (C.A. 3), certiorari denied, 421 U.S. 1011; *Barnett* v. *W. T. Grant Co.*, 518 F. 2d 543, 548 (C.A. 4). Plaintiffs were required to establish the right to relief of each member of the class in order to establish their own claim.[14] ETMF admits that, to the extent that plain-

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[13] Although there is confusion as to the interpretation of the typicality provision (see *Penn* v. *San Juan Hospital, Inc.*, 528 F. 2d 1181, 1189 (C.A. 10)), to the extent that it imposes an independent requirement in addition to other provisions of Rule 23(a), it is generally satisfied where "the claims * * * of the representatives and the members of the class stem from a single event or are based on the same legal or remedial theory" (7 Wright & Miller, *Federal Practice and Procedure*, § 1764, p. 90 (1975 Pocket Part)) and where "the legal or factual position of the representatives is markedly different from that of other members" (*ibid.*). See, *e.g.*, *Gonzales* v. *Cassidy*, 474 F. 2d 67, 71, n. 7 (C.A. 5).

[14] Since the San Antonio terminal is as distant from a road terminal as any other Texas non-road terminal, in establishing their own right to relief plaintiffs necessarily had to show that these other minority city drivers also were entitled to relief. Plaintiffs therefore satisfied Rule 23(a)(3).

tiff's claims differed from those of the class, plaintiffs' were weaker than those of other class members (see ETMF Br. 34). In fact, it was possible that even though plaintiffs were not able to establish their own claims, the claims of other class members nevertheless would have been upheld. In these circumstances plaintiffs could be expected to represent the interests of the class adequately within the meaning of Rule 23(a)(4). See, generally, *Reed* v. *Arlington Hotel Co.*, 476 F. 2d 721 (C.A. 8), certiorari denied, 414 U.S. 854; *Mack* v. *General Electric Co.*, 329 F. Supp. 72 76 (E.D. Pa.).[15]

Finally, this action also met the requirements of Rule 23(b)(2). Most Title VII actions are by their very nature class actions, since they involve claims of discrimination on the basis of class characteristics. Courts have therefore held with virtual unanimity that actions under Title VII are properly maintainable under Rule 23(b)(2). *Wetzel* v. *Liberty Mutual Insurance Co.*, 508 F. 2d 239, 250–251 (C.A. 3), certiorari denied, 421 U.S. 1011; *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F. 2d 1364, 1375 (C.A. 5); *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 801–802 (C.A.

[15] Although the relief sought by all city drivers involved the same road vacancies, this does not establish a conflict or antagonism within the meaning of subsection (a)(4). As long as all class members were united in the contention that defendants had discriminated against them, a potential conflict as to relief, which apparently has not materialized, does not defeat the maintenance of a class action. See *Blackie* v. *Barrack*, 524 F. 2d 891, 909 (C.A. 9). Furthermore, the district court could, if necessary, shape relief in order to eliminate any conflicts between subclasses of minority city drivers domiciled at road and non-road terminals.

4); *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711, 720 (C.A. 7).

The court of appeals was, therefore, correct in reversing the dismissal of plaintiffs' class allegations and in certifying this case as a Rule 23(b)(2) class action.[16]

3. While the court of appeals was correct in reversing the judgment and certifying the class, we believe that its contemporaneous determination of liability to the class was premature and possibly prejudicial to the petitioners in their defense of the case. Cf. *Jimenez* v. *Weinberger*, 523 F. 2d 689, 699 (C.A. 7). Even though, as we have argued, the district court had an independent obligation to determine whether certification was proper, the court did not do so. As a result it cannot be said with assurance that the parties had adequate notice of the allocation and order of proof that would typically follow from a class certification decision at the outset, or, in particular, that the defense was conducted as it would have been in response to a class action. In light of the evidence developed by the government in its case against

[16] Petitioner ETMF makes abstract claims that certification by the court of appeals deprived the defendants of their right to submit evidence and advance legal argument on the class certification issue (ETMF Br. 16), but fails to specify what other information might be adduced or legal arguments made in addition to those presented to the court of appeals. Petitioners' only specific arguments are addressed, not to the propriety of the class certification, but to the scope of the class certified, and the possible propriety of subclasses (ETMF Br. 33–36). However, these concerns can be fully accommodated by the district court's discretion on remand to consider appropriate options, including the use of subclasses, for the disposition of the class action claims.

ETMF (see *infra*), it seems unlikely that it or the other petitioners can successfully defend a properly presented *prima facie* case of class discrimination; however, they should be given an opportunity to attempt to do so. The case, accordingly, should have been remanded to the district court for further trial on a class action theory.

The state of the record also makes this case inadequate for consideration by this Court of important questions of liability and remedies in Title VII class litigation. As the Statement, *supra,* makes evident, the evidence in this record is limited, in fact it represents only a small portion of the pertinent information available concerning the employment practices of ETMF. Among the relevant information available but not contained in the record are stipulations regarding the earnings differential of city drivers and line drivers (*United States* v. *ETMF,* Pltf. Ex. 44),[17] testimony concerning the Company's practice of referring white applicants at one terminal to road driver positions at another (*United States* v. *ETMF,* Tr. 663–664), examples of white applicants referred to or hired at terminals other than where they resided (*United States* v. *ETMF,* Pltf. Ex. 17, Tab 9; Pltf. Ex. 18, pp. 1–3, 5), deviations in ETMF's "hiring standards" as applied to white applicants (*United States* v. *East Texas Motor Freight System, Inc.,*

[17] Relevant portions of the record in *United States* v. *ETMF*, including portions cited herein, have been lodged with the Court by *amicus curiae* N.A.A.C.P. Legal Defense and Educational Fund, Inc., in a document entitled "Exhibit of Amicus Curiae, N.A.A.C.P. Legal Defense and Educational Fund, Inc."

supra, 10 EPD at 5416, 10 FEP Cases at 973), evidence that approximately 25 percent of the Company's road drivers did not meet the minimum standards when hired (*United States* v. *ETMF,* Pltf. Ex. 13), unrebutted testimony that ETMF's policy was to not hire blacks or Mexican-Americans as road drivers (*United States* v. *ETMF,* Tr. 143–144), and unrebutted testimony that the no-transfer rule was implemented in order to prevent incumbent black drivers who had expressed interest from transferring to road driver jobs (*United States* v. *ETMF,* Tr. 152). Any decision on liability or remedy issues would thus not only take place in a vacuum, but would be artificially abstracted from evidentiary material which is known to be available and which can be developed in a proper trial on the class action claims. Moreover, most of these issues are present in *T.I.M.E.–D.C.* in the context of a broader more detailed record resulting from a trial in which all parties were fully apprised from the outset that the case would be tried and decided on the basis of the pattern and practice allegations.

We therefore believe that the Court should not reach important substantive questions of Title VII enforcement in the context provided by the record in this case. The case should be remanded to the trial court for further proceedings as a class action. That disposition would permit the district court properly to examine all of the evidence relevant to ETMF's employment practices and petitioners' defenses, and to consider in light of further evidence whether any ad-

justments should be made in the definition of the class (see Resp. Br. 33, n. 33).[18]

CONCLUSION

The judgment of the court of appeals should be affirmed on the class action questions. The court of appeals' judgment as to liability should be vacated and the case remanded for trial proceedings consistent with this Court's decision in *International Brotherhood of Teamsters and T.I.M.E.–D.C.* v. *United States and Equal Employment Opportunity Commission*, Nos. 75–636 and 75–672.

Respectfully submitted.

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DECEMBER 1976.

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[18] Proceedings on remand would, of course, be conducted in light of this Court's guidance in resolving the questions presented in *T.I.M.E.–D.C.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-651

TEAMSTERS LOCAL UNION 657,

Petitioner,

vs.

JESSE RODRIGUEZ, et al.,

Respondents.

No. 75-715

SOUTHERN CONFERENCE OF TEAMSTERS,

Petitioners,

vs.

JESSE RODRIGUEZ, et al.,

Respondents.

No. 75-718

EAST TEXAS MOTOR FREIGHT SYSTEM, INC.,

Petitioner,

vs.

JESSE RODRIGUEZ, et al.,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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INDEX

ARGUMENT— PAGE

The Writs Should Be Dismissed as Improvidently Granted 2

I. The Company Petition 3

1. Reliance on "Mere Statistics" 3

2. Class Action 8

3. The City-Road No Transfer Rule 10

4. The Inter-Terminal No Transfer Rule 11

5. The Individual Claims 13

II. The Union Petitions 16

CONCLUSION 18

APPENDIX 1a

TABLE OF AUTHORITIES

Cases:

Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R., 389 U.S. 327 (1967) 18

Franks v. Bowman Transportation Co., 47 L.Ed.2d 444 (1976) 13

International Brotherhood of Teamsters v. United States, No. 76-636 17

McCarthy v. Bruner, 323 U.S. 673 (1944) 7

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 15

Phillips v. New York, 362 U.S. 456 (1964) 18

PAGE

United States v. Central Motor Lines, Inc., 4 EPD ¶ 7624 (W.D.N.C. 1971) 11
United States v. East Texas Motor Freight System, Inc., 10 EPD ¶ 10, 345 (N.D.Tex. 1975) ..... *passim*
United States v. Terminal Transport Co., 11 EPD ¶ 10,704 (N.D.Ga. 1976) 11
United States v. Trucking Employers, Inc., No. 74-453 (D.D.C.) 6

Watkins v. Scott Paper Co., 530 F.2d 1159 (5th Cir. 1976) 13

Other Authorities:

Federal Rules of Civil Procedure, Rule 60(b)(6) 9

United States Census of Population, 1970 13

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ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

N.A.A.C.P. Legal Defense and Educational Fund, Inc., hereby moves to for leave to file the attached brief as *amicus curiae.*

The N.A.A.C.P. Legal Defense and Educational Fund, Inc., is a non-profit corporation incorporated under the laws of the State of New York. It was formed to assist Negroes to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal services gratuitously to Negroes suffering injustice by reason of racial discrimination. For many years attorneys of the Legal Defense Fund have represented parties in employment discrimination litigation before this Court and the lower courts. The Legal Defense Fund believes that its experience in employment discrimination litigation may be of assistance to the Court. The proposed brief is submitted in support of respondent though advancing reasons somewhat different than those relied on by the courts below.

WHEREFORE, the N.A.A.C.P. Legal Defense and Educational Fund, Inc., respectfully prays that this motion be granted, and that the attached brief be filed.

Respectfully submitted,

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ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

ARGUMENT

The Writs Should Be Dismissed as Improvidently Granted.

The issues actually presented by these cases are substantially different than those which were raised in the petitions for certiorari. In June, 1972, petitioner East Texas Motor Freight (hereinafter ETMF), together with the International Brotherhood of Teamsters, was sued by the United States. The government's complaint, as the complaint in this action, alleged systematic discrimination against blacks and Mexican-Americans, and sought broad monetary and injunctive relief. In April, 1975, an extended trial was held in *United States* v. *East Texas Motor Freight System, Inc.* (hereinafter *US* v. *ETMF*); on May 28, 1975, the District Court upheld the government's claim of discrimination and awarded to minority employees at present or former road terminals injunctive relief more stringent than that awarded in this case.[1] 10 EPD ¶10,345. The parties in *US* v. *ETMF* have appealed only certain portions of the relief, and do not there contest the finding of discrimination.[2] The company in the instant case ex-

[1] Under the Fifth Circuit decision in this case, a city driver who transfers to the road will have carry over seniority dating from the point at which he had three years of truck driving experience. 505 F.2d 40, 63, n. 29, 62. Under *US* v. *ETMF*, transferring employees will have two more years of seniority, dating from the point at which they had one year of experience.

[2] The company did not appeal. The union appeal raises three questions: whether the union locals were necessary parties, whether the locals and Southern Conference were alone responsible for the seniority system, and whether the seniority relief ordered by the district court should have been based on a more individualized analysis of the employment history of each minority worker. No. 75-3332, 5th Cir.

pressly relies on *US* v. *ETMF* for its own purposes,[3] but otherwise ignores developments therein.

The evidence which petitioners assert is required to support the decision below, which they object is absent from the record in this case, is to a substantial degree present and uncontested in *US* v. *ETMF*.[4] As to certain issues and class members, the instant case has been rendered partially moot by *US* v. *ETMF*.[5] These circumstances were known to petitioners prior to the grant of certiorari, and were not disclosed to the Court. In addition, of the questions originally presented by the petitions, some have, for all practical purposes, been abandoned, and others are not supported by the record in this case. In light of these considerations, amicus believes that certiorari was improvidently granted and that the writs should be dismissed.

I. *The Company Petition*[6]

1. Reliance on "Mere Statistics"

The only question presented by the company's petition which is pressed in recognizable form in its brief is "[w]hether the Court of Appeals properly relied on undifferentiated statistical evidence in entering a finding of liability in favor of the Plaintiff class."[7] The company asserts that the sole evidence of discrimination was the mere fact that, of several hundred road drivers employed

[3] Company Brief, p. 34.

[4] Amicus has lodged with the Court a copy of the relevant portions in the record in *US* v. *ETMF*. That document, headed "Exhibit of Amicus Curiae, N.A.A.C.P. Legal Defense and Educational Fund, Inc.", is referred to hereafter as EA.

[5] See p. 6, *infra*.

[6] No. 75-718.

[7] Company Petition, pp. 3, 26-31; Company Brief, pp. 2, 37-54.

by defendant prior to 1970, none was black or Mexican-American. Such evidence, the company argues, was insufficient to constitute a *prima facie* case of discrimination against minority drivers.[8] The company's petition presented a frontal attack on the use of statistics, and suggested certiorari was appropriate to consider in broad terms the efficacy and reliability of such evidence.[9] In its brief, however, the company largely restricts its discussion to the relevance of such evidence to minority employees at city terminals,[10] and does not vigorously contest its probative value for road terminals.[11]

At the trial in *US* v. *ETMF*, Mr. George Smith, ETMF's personnel director from 1952 to 1967, testified candidly as to the policy of the company regarding the hiring of non-white road drivers:

Q. (By Mr. Gadzichowski) What was the policy of the company at that time?

A. The company, so far as road drivers was concerned, did not want to employ minorities as road drivers.

Q. When you speak of minorities, do you mean Blacks and Spanish surnamed Americans?

A. I do.

[8] Company Brief, p. 42.

[9] Company Petition, p. 30:

"In light of the growing reliance on statistical evidence to prove liability in civil rights cases and the explosion of complex, complicated class actions in this area, the Court should grant the Petition herein and articulate the burden of proof required by a class action Plaintiff, both in terms of the quantity and quality of statistical evidence necessary to produce an inference of discrimination and the additional evidence required to support that inference sufficiently to establish a *prima facie* case."

[10] Company Brief, pp. 40-49.

[11] See Company Brief, p. 46, n.15.

Q. Were you aware of that policy that the company had?

A. I was.

Q. Was there any question in your mind that that was the policy?

A. There was not.

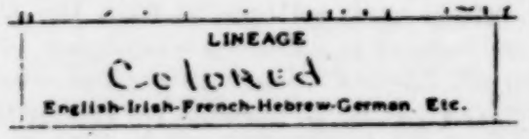
Q. And did the policy continue during your tenure at East Texas Motor Freight?

A. It did.

Q. Was it still in existence at the time you left?

A. It was.[12]

The government offered a 1966 memorandum to Smith from ETMF's Atlanta office describing a black driver and concluding, "So the long and short of it is that if and when we must hire colored boys, this one would be a good one . . ." [13] At least until 1963 this policy of discrimination was implemented by an ETMF application form which required the prospective employee to state his race in the following box:[14]



Black employees testified that they were expressly told road driver jobs, both permanent and casual, were for whites only.[15]

[12] EA 38.

[13] EA 276.

[14] EA 234, 236, 244, 245, 282-288.

[15] EA 75-78, 80, 127-128.

On the basis of this and other testimony, the District Court in *US* v. *ETMF*[16] concluded:

> The evidence showed that discrimination occurred against Blacks and Spanish-surnamed Americans who applied for or attempted to transfer to over-the-road jobs with ETMF and its acquired companies. When they sought to transfer, their seniority for bidding, layoff and recall purposes was lost. As a result of losing these rights, there has been little desire to transfer to over-the-road jobs. The seniority system of the Unions is a barrier to the movement of minorities from city or other bargaining unit jobs to over-the-road jobs. It effectively locks Blacks and Spanish-surnamed Americans into their jobs and means that seniority for minority employees [must be] built up in other than over-the-road bargaining units.

Neither defendant in that action appealed from this finding of discrimination.[17] The injunctive relief ordered by the District Court in *US* v. *ETMF* covers at least 76 of the 199 class members in this action,[18] and 59 of them have already entered into a cash settlement with the company.[19]

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[16] 10 EPD ¶ 10,345, p. 5416 (N.D. Tex. 1975); EA 293.

[17] See n.2, *supra*.

[18] It includes certain city drivers at the El Paso, Dallas, San Angelo, Longview, San Antonio and Houston terminals. See EA 296-312. Although a large number of trucking companies have in the past had policies forbidding transfers from city to road driver positions, most of them agreed in 1974, pursuant to a consent decree in *United States* v. *Trucking Employers, Inc.*, No. 74-453 (D.D.C.), to permit minority city drivers to transfer to the road. The validity of such policies is thus of less import than suggested by the petitions.

[19] EA 299-303. The liability of the International to the 79 covered employees is the subject of a pending appeal in *US* v. *ETMF*.

In short, petitioners are asking the Court to issue a far reaching decision as to the probative value of "mere statistics" under Title VII in a case which there is known to be massive non-statistical evidence of racial discrimination as well as an uncontested judicial finding of discrimination. Regardless of whether, in the narrowest of senses, the record could be said to present a question about the evidentiary significance of such statistics, the underlying controversy obviously does not. *McCarthy* v. *Bruner*, 323 U.S. 673 (1944). This is manifestly not an appropriate case in which to decide such matters; had the Court known of the above-described facts at the time when the certiorari petitions were under consideration, it is unlikely that certiorari would have been granted on this issue.[20]

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[20] The Company's Petition presented a related question no longer vigorously pursued, at least in its original form: "Whether the Court of Appeals, consistent with due process, may ignore a pre-trial stipulation. and *sua sponte* make a finding of liability without affording the Defendant an opportunity to present evidence to the District Court." The petition dwelt at length on the fundamental unfairness of being held liable without having an opportunity to produce evidence in opposition to the claim of class-wide discrimination. Company Petition. pp. 10-21.

In its brief, however, the Company no longer presses this contention. No specific suggestions are made as to what evidence the Company would have introduced had it "known" the question of class-wide discrimination was at issue in the district court. This is not surprising in light of the evidence in *US* v. *ETMF*. The stipulation referred to in the question presented is now relied on solely insofar as it bears on whether the court of appeals erred in approving the case as a class action. Company Brief, pp. 14, 25. Although the company asserts that it "concentrated" its defense on the qualifications of the named plaintiffs, Company Brief, p. 25, the record establishes that this was not the case. App. 141-193. The company now concedes that the Fifth Circuit decision affords it an opportunity, at the second stage of this bifurcated proceeding, to introduce evidence that, because of a lack of interest or qualification, any individual class member was not injured by the policy of hiring only white road drivers and is thus not entitled to relief. Company Brief, pp. 52-53.

2. Class Action

The question presented by the original petition was "whether absent a class action hearing or an equivalent opportunity *to present evidence* on the question of the appropriateness of the class the Court of Appeals may certify the litigation as a class action and enter a finding of liability in favor of the Plaintiff class." [21] (Emphasis added) On its face, this question indicated that the only relief to be sought, were certiorari granted, would be a decision affording petitioner an opportunity to present such evidence.

In its brief, however, the company, rather than seeking a remand for an evidentiary hearing, now urges that this Court reinstate the district court's denial of class action treatment.[22] The company advances nine legal arguments as to why this case is not an appropriate class action.[23] The company also offers four reasons why the scope of the class should be narrowed.[24] These, however, are not the

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[21] Company Petition, p. 3.

[22] Company Brief, pp. 13-36.

[23] (1) That plaintiffs abandoned the class aspect by inaction. Company Brief, p. 15, n. 3, 28. (2) That plaintiffs stipulated it was not to be a class action. *Id.*, p. 16. (3) That plaintiffs violated their responsibility under Rule 23 to move for a class action determination. *Id.*, pp. 14, 16, 18-21. (4) That the case was not in fact tried as a class action. *Id.*, pp. 25, 29, 37. (5) That the district court acted within its discretion. *Id.*, pp. 15, 23. (6) That plaintiffs failed to adduce evidence to support a class action. *Id.*, pp. 14, 16-18. (7) That the court of appeals erred in stating the propriety of a class action was uncontested. *Id.*, p. 30. (8) That all Title VII suits are not appropriate class actions. *Id.*, pp. 31-32. (9) That a class should not be certified after a decision on the merits. *Id.*, p. 27.

[24] (1) That there may be different types of discrimination at each terminal. *Id.*, p. 33. (2) That city drivers at road terminals are covered by *US* v. *ETMF*. *Id.*, p. 34. (3) That the interests of city drivers at road terminals conflict with those of city drivers at city terminals. *Id.*, pp. 34-35. (4) That most applicants for driving jobs only want to work in the town where they apply. *Id.*, pp. 35-36.

questions regarding which certiorari was sought and granted.

The company's 67 page brief contains a single sentence *pro forma* objection to the alleged denial of an opportunity to present argument and evidence.[25] In fact, however, the company in the Fifth Circuit did brief extensively the question of or whether this case was a proper class action.[26] Legal argument was also presented on the propriety of a class action in the Company's Petition for Rehearing and Suggestion for Rehearing En Banc,[27] and that Petition offered no intimation that the company had in any way been prevented from advancing legal argument in its brief or petition in the Fifth Circuit. The company has yet to offer any indication as to what evidence it would have wanted to introduce as to the propriety of a class action, why it would have been relevant, or even whether it has or would seek to introduce such evidence on remand. If, by any chance, the company has relevant evidence and can demonstrate on remand that the earlier proceedings provided no adequate notice that the evidence was called for, the company may introduce it and seek appropriate modification of the class action order under Rule 60(b)(6), Federal Rules of Civil Procedure.

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[25] Company Brief, p. 29.

[26] Brief of Appellee-Defendant East Texas Motor Freight System, Inc., No. 73-2801, pp. 11-18; EA 313-321.

[27] Pp. 12-15; EA 322-326. Many of the arguments advanced in this Court in opposition to class action treatment were not advanced below, despite ample opportunity to do so. The Company's real grievance seems to be not that it had no such opportunity, but that it failed to put the opportunity to good use.

3. The City-Road No Transfer Rule

The company argues that its rule prohibiting employees from transferring from jobs as city drivers to positions as road drivers was adopted in order to "maintain" the higher standards adopted two decades ago for road drivers because of a serious accident problem.[28] The rule is of vital importance to minority drivers, since it prevents them from moving from the lower paid city driver jobs, to which they were confined on the basis of race until at least 1974, into the more lucrative road jobs.[29] What relevance this contention has to the questions presented is not apparent.

In any event, this explanation has no basis in fact. On its face it is unpersuasive, for higher age, experience or other standards for road drivers could be preserved merely by providing that a city driver could transfer to the road only if he met the higher standards. The Appendix page cited by the company in support of this explanation contains neither reference to differences in standards nor testimony with regard to ETMF's safety record in the 1950's; rather, the rule is there explained as a way to maintain continuity of relationships between city drivers and their customers, an argument long ago abandoned. App. 167. The previous page of the testimony offers as the primary reason for the rule a paternalistic desire to protect the "best interest" of city employees who might be foolishly tempted by the higher wages of road jobs to give up their

[28] Company Brief, p. 7; Company Petition, p. 7.

[29] In *US* v. *ETMF*, the company stipulated average earnings at 5 typical terminals were as follows:

Classification	*1970*	*1971*	*1972*
Road Driver	$12,368	$15,333	$18,100
City Employee (City driver, etc.)	9,348	11,339	12,952

It further stipulated that average road driver out of pocket expenses in 1972 were about $50.00 a week. EA 289-291.

city seniority and neglect their "family responsibilities". App. 166.

The actual reason for the rule was candidly disclosed in *US* v. *ETMF* by the former company official who was ETMF's personnel director when the rule was adopted:

> Q. Do you know why that No Transfer Policy was put forth and implemented?
>
> A. Yes, to prevent Blacks who are in the city operation transfering to the road operation.
>
> Q. Is there a specific city operation that Blacks were seeking to transfer from the city to the road?
>
> A. St. Louis, among others.[30]

Although the Southern Conference urges that all drivers "prefer" the "traditional" [31] separation of city and road jobs, with a loss of seniority for any transferring employee, that is not so. Teamster contracts road and city rosters are merged in the northeast and for certain midwest companies, and transfers without seniority loss are authorized in several states.[32]

4. The Inter-Terminal No Transfer Rule

The Company expressly recognized in its petition that, if there were a past policy of not hiring minority road drivers, the prohibition against transfers between terminals would have an impermissible "lock in" effect if "minority drivers were hired in city-driver-only terminals in dispro-

[30] EA 47. There is substantial evidence that whites were in fact allowed to transfer to the road after adoption of the no-transfer rule. See EA 85, 98-100, 104, 156, 163, 228, 233-274.

[31] Southern Conference Petition, 8-9.

[32] See, e.g., *United States* v. *Central Motor Lines, Inc.*, 4 EPD ¶ 7624, p. 5441 (W.D.N.C. 1971); *United States* v. *Terminal Transport Co.*, 11 EPD ¶ 10,704, p. 6940, n. 9 (N.D. Ga. 1976).

portionate numbers."[33] The company advises the Court that "There is no evidence in the record to support such an assertion."[34] The Southern Conference alleges that the number of minority city drivers at each terminal "generally reflected the racial-national origin make-up of the respective communities in which the terminals are located.[35] Both of these assertions are refuted by the record in this case.

Of the black drivers in Texas, 91.58% (87 of 95) work at city only terminals, as do 66.46% of Mexican Americans (68 of 104). Only 36.95% of white drivers work at city only terminals (211 of 571).[36] This is precisely the disproportionate concentration of minority drivers at city only terminals that the company properly recognized would require abandonment of the prohibition against inter-terminal transfers.

Neither is it the case, as suggested by the Southern Conference, that minority city drivers are evenly distributed among the 20 terminals with city drivers. On the contrary, 87.36% of all black city drivers work at just 2 terminals, Houston and San Antonio; 86.53% of all Mexican-American drivers work at Houston, San Antonio or El Paso. There are 13 city terminals with *no* minority city drivers, compared to 138 white city drivers. Minority employees constitute 76.65% of all city drivers at Houston, San Antonio, and El Paso, and only 7.26% of the city drivers at the remaining 17 terminals. As a practical matter, city driver was a non-white job in those three terminals, and a white job everywhere else. Nor can this pattern be explained by variations in the population; at the 13 terminals with no

[33] Company Brief, p. 40, n. 10; Company Petition, pp. 18, 27.

[34] Company Brief, p. 40, n. 10.

[35] Southern Conference Brief, p. 8.

[36] See p. 1a, infra.

minority drivers, blacks and Mexican-Americans constitute 24.76% of the population. See p. 1a, *infra*.

The company suggests that its failure to hire virtually any minority road drivers may be the result of an absence of minority truck drivers in Texas. Census data reveals, however, that 39.62% of all truck drivers in the state are black or Mexican-American,[37] compared to 26.06% of all ETMF truck drivers and 1.64% of ETMF road drivers. In the 18 cities, other than Houston, San Antonio, and El Paso, where only 7.26% of ETMF's drivers were non-white, 39.40% of the drivers in the area were non-white. In the 13 cities where *none* of ETMF's drivers were black or Mexican-American, 32.19% of the area drivers were black or Mexican-American. See, p. 2a, *infra*.

5. The Individual Claims

The company has briefed at length the question of whether it was guilty of discrimination against the individual plaintiffs.[38] It argues that each of the plaintiffs was unable to meet either the age, weight or driving record requirements,[39] and that one of them had been involved in on-the-job accidents.[40] The question of whether the court of appeals erred in its treatment of the individual claims has not the slightest relationship to any of the questions presented by the petition.

As this Court recognized in *Franks* v. *Bowman Transportation Co.*, 47 L.Ed.2d 444, 446, n. 32 (1976),[41] a company cannot ground its refusal to hire a black appli-

[37] United States Census of Population, 1970, vol. 45, Texas, Tables 171, 179, pp. 1583, 1819-21.

[38] Company Brief, pp. 55-66.

[39] Id., pp. 63; see also 21-22, n. 6.

[40] Id., p. 8.

[41] See, e.g., *Watkins* v. *Scott Paper Co.*, 530 F.2d 1159, 1177-78 (5th Cir. 1976) and cases cited.

cant on his failure to meet a standard or requirement which has not been uniformly applied to whites. The record in *US* v. *ETMF* reveals literally hundreds of instances in which whites were hired as road drivers who did not meet the age, weight, education or experience requirements nominally adhered to by the company.[42] In 1966 the company personnel director wrote a memorandum which stated:

> With respect to job specifications, it is recommended that they be kept flexible as in the past. Our hiring limits have always been taken as guidelines, not so specific "yes" or "no" criteria. Since we place a great deal of emphasis on the individual being considered for any position, we will wish to remain flexible enough to deviate from our "guidelines" of policy for an outstanding applicant, who may not be the "policy" age or possess the "policy" experience, etc. This practice could be a difficult one to defend, if we were ever called upon to justify non-hiring of a negro over a white for a given job. We must handle future non-selection of negro applicants over whites for the same job on a basis *other* than not meeting specific standards, in view of the fact that we have deviated from our "standards" to hire others for the same job.[43]

The director testified at trial in *US* v. *ETMF* that the standards were only informal "guidelines", and that they were often disregarded.[44] On the basis of this evidence the District Court in *US* v. *ETMF* held:

> ETMF did not strictly comply with stated company hiring standards through the years when hiring drivers

[42] EA 149-219, 227-232, 268-274.

[43] EA 279.

[44] EA 39, 56-60.

> for over-the-road jobs. Deviations may be found from every standard regarding age, education, safety record, and driving experience, although some driving experience was generally required.[45]

Although the company objects that plaintiffs are unqualified because they lack 3 years of road driving experience, in 1972 it offered to waive that requirement for any of its hundreds of city drivers at road terminals who wished to transfer to the road.[46] Clearly these allegedly "stringent"[47] standards were used, *inter alia*, as a pretext to reject qualified blacks and Mexican-Americans; they should be given no credence by this Court. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 804 (1973).

The company further suggests that the individual plaintiffs would have been treated no differently had they been qualified whites, since the San Antonio terminal employs only city drivers and cannot hire for other terminals.[48] The company director of safety, however, testified in *US* v. *ETMF* that the officials at one terminal would inform applicants of vacancies at other terminals.[49] The record in that case reflected instances in which applicants at one terminal were referred to another and in which applications were forwarded from one terminal to another.[50] Manifestly none of this would have been done for a minority driver, at San Antonio or elsewhere, who indicated an in-

[45] 10 EPD ¶ 10,345, p. 5416 (N.D. Tex. 1975); EA 293.

[46] *Compare* Company Brief, p. 8, *with* App. 73.

[47] Company Brief, pp. 6-7; Company Petition, p. 7.

[48] Company Brief, pp. 53-59.

[49] EA 147-148.

[50] EA 183 (Victor Reeves), 220-26 (James White), 228 (Robert Mckinley, Roger Amstutz), 229 (Martin Treece, Donald Taylor), 230 (James White), 232 (Donald White).

terest in road jobs which were only available at another terminal.

Although in this action the company vigorously objects to permitting the named plaintiffs to transfer to road jobs at another terminal, the consent decree signed by the company two years ago in *US* v. *ETMF* permits such transfers to all minority city drivers in Texas who sought to transfer between 1965 and 1974, regardless of whether they have road experience. App. 108, 432. Since each of the named plaintiffs applied for such a transfer in 1970, each of them is literally covered by both the consent decree and the injunctive relief ordered in *US* v. *ETMF*. Thus the company agreed in *US* v. *ETMF* to the very relief for the named plaintiffs which it here opposes.[51]

II. *The Union Petitions*

Although the Southern Conference petition presented 4 questions, the Conference has elected to pursue only two of them.[52] The abandoned questions dealt with the sufficiency of the evidence of discrimination, and thus bore on the propriety of the injunctive relief ordered by the court of appeals.[53] The two questions which the Conference has elected to pursue deal solely with whether the finding of union liability was proper in view of various factual circumstances emphasized by that petitioner.[54] The Conference urges that these circumstances compel that conclusion that company alone should bear monetary responsibility for the injury suffered by the plaintiff class.[55]

[51] Counsel for *amicus* have been unable to ascertain with certainty why this transfer has not occurred.

[52] See Southern Conference Brief, pp. 2-3, n. 2.

[53] The Conference "defers" on those questions to the arguments of the company, discussed *supra*.

[54] The Conference argues that the seniority lock-in provisions of its collective bargaining agreement never had any effect because minority employees were also locked in by the company's no transfer rule. It could, of course, be argued with equal cogency that the company rule never had any effect because of the union rule. Whichever may be the "real" cause of the inability of minority drivers to transfer, once that rule is enjoined the other rule would become operative and have to be enjoined as well.

The Conference also objects to monetary liability on the ground that the Teamsters actively support placing minority victims of discrimination in their "rightful place". Conference Brief, pp. 33-34. The record in this case reveals not a single instance in which union officials took action to prevent or remedy ETMF's flagrant policy of discrimination; the record in *US* v. *ETMF*, reveals a refusal to do so. EA 87-88, 113-119.

[55] The Conference Brief discusses at length whether the injunctive relief ordered below was excessive, an issue unrelated to the original questions presented. Conference Brief, pp. 23-36. The Conference suggests that minority city drivers who were the victims of discrimination be given carry over seniority only from the date on which they applied for road jobs. The record in *US* v. *ETMF*, however, shows, as the Conference well knows, that the company refused to permit and actively discouraged applications by non-whites for road jobs, and that minority drivers were detered from applying by the well known ETMF policy of discrimination. EA 99a, 100a, 100b, 104a, 104b, 107, 107a, 143-5.

The Local Union complains that, on the particular facts of this case, it should not be held liable. It stresses that, under the delegations of authority within the Teamsters, it is the International and Conference which negotiate the actual contracts and that they alone should be liable. The International, in *US* v. *ETMF* and in *International Brotherhood of Teamsters* v. *United States*, No. 76-636, advances the opposite contention, urging that the locals alone are liable because they are the entities which approve the contracts.

Whatever the merits of these conflicting contentions, the sole consequence of the Fifth Circuit's finding of liability against the Conference and Local is to authorize the district court to apportion some part of the total back pay liability

to them. A careful reading of the opinion below, however, reveals that the court of appeals expressly recognized the "broad discretion" of the district court in allocating back pay liability among the defendants. All of the arguments made here by the Local and Conference can be made in the district court and, if sound, might lead that court to fix the unions' financial responsibility at a nominal amount, or even place the entire responsibility on the company. Since such a decision would afford the Local and Conference all the relief they seek here, it is apparent that the questions presented by the union briefs are interlocutory in nature and that the grant of certiorari was premature. *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967).

CONCLUSION

The questions actually raised by this case are not those suggested by the petitions. To a significant extent the petitioners have abandoned the questions originally presented, and now seek to litigate issues not raised by the petitions and as to which certiorari was not and would not have been granted. Certain pivotal arguments of the petitioners are without foundation in the record itself. *Phillips* v. *New York*, 362 U.S. 456 (1964). Many of the factual assertions and defenses advanced by the petitioners, though plausible within the narrow confines of the record, are manifestly insubstantial in view of the evidence and findings in *US* v. *ETMF*. In view of the fact that counsel for the company and Southern Conference were counsel in *US* v. *ETMF*, they should have disclosed the circumstances of that case in their petitions and briefs.

At best the Court is invited to write a difficult and far reaching opinion about a hypothetical case which would exist if the facts were not as they are now known to be. The invitation should be declined, and the writs of certiorari should be dismissed as improvidently granted.

Respectfully submitted,

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APPENDIX

ETMF Drivers

February 29, 1972

Terminal	*White Drivers*	*Black Drivers*	*Mexican American Drivers*	*City Minority Population*
Abilene: City	11	0	0	15.65%
Amarillo: City	5	0	0	11.79%
Atlanta*: City	2	0	0	—
Austin: City	8	0	0	27.50%
Beaumont: City	29	3	0	33.69%
Brownwood: City	5	0	0	11.69%
Dallas: Road	59	0	0	32.93%
City	107	5	11	
El Paso: Road	52**	0	3	60.41%
City	0	1	22	
Fort Worth: City	35	0	0	28.53%
Henderson: City	2	1	0	28.08%
Houston: City	47	73	37	37.85%
Longview: Road	32	0	0	19.95%
City	28	1	0	
Lubbock: City	8	0	0	23.34%
Lufkin: City	11	0	0	30.43%
Marshall: City	7	0	0	34.96%
Odessa: City	15	0	0	19.52%
Pecos: Road	15	0	0	52.25%
San Angelo: Road	33	0	0	24.22%
City	18	1	0	
San Antonio: City	6	10	31	59.76%
Texarkana: City	9	0	0	28.85%
Road	6	0	0	
Tyler: City	21	0	0	23.71%

* Population under 10,000, census data on minority population not published.

** This appears to include 2 Indians.

Source: App. 322, 353-415; United States Census of Population, 1970, vol. 45, Texas, Tables 40, 91, 97, 108, 112.

Appendix

Truck Drivers
At Places With ETMF Terminals
By Race

Terminal	*Total Drivers*	*Black Drivers*	*Mexican American Drivers*	*Percent Minority Drivers*
Abilene	627	18	39	9.09%
Amarillo	1,161	74	68	12.23%
Atlanta*	—	—	—	—
Austin	906	259	250	56.18%
Beaumont	865	550	17	65.54%
Brownwood**	276	7	8	5.43%
Dallas	6,381	2,674	485	47.50%
El Paso	1,795	60	1,361	79.16%
Ft. Worth	2,648	871	177	39.57%
Henderson**	230	99	***	43.04%
Houston	9,480	5,126	979	64.89%
Longview**	690	165	13	25.80%
Lubbock	981	76	176	25.69%
Lufkin**	445	154	6	35.95%
Marshall**	328	129	***	39.33%
Odessa	811	44	117	19.85%
Pecos**	358	5	329	92.73%
San Angelo	400	24	80	26.00%
San Antonio	4,002	493	2,463	74.86%
Texarkana	556	124	0	22.30%
Tyler	365	60	0	16.43%

* Population under 10,000, census data on minority population not published.

** Data for these cities includes some transportation equipment operatives other than truck drivers.

*** No Mexican-American data published.

Source: United States Census of Population, 1970, vol. 45, Texas, Tables 86, 93, 99, 105, 110, 115.

Supreme Court, U. S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. 75-651

TEAMSTERS LOCAL UNION 657,
Petitioner,
v.
JESSE RODRIGUEZ ET AL.,
Respondents.

No. 75-715

SOUTHERN CONFERENCE OF TEAMSTERS,
Petitioner,
v.
JESSE RODRIGUEZ ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF FOR THE NATIONAL RAILWAY LABOR CONFERENCE AS AMICUS CURIAE

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TABLE OF CONTENTS

	Page
Table of authorities	i
Motion for leave to file brief as *amicus curiae*	v
Brief as *amicus curiae*	1
Interest of *amicus curiae*	1
Question presented	2
Statement of the case	2
Argument	6
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 (1974)	16, 17
Albemarle Paper Co. v. *Moody*, 422 U.S. 405 (1975)	14, 17
Bing v. *Roadway Express, Inc.*, 485 F.2d 441 (5th Cir. 1973)	9
Carey v. *Greyhound Bus Co.*, 500 F.2d 1372 (5th Cir. 1974)	13, 15
Dent v. *St. Louis-San Francisco Railway Co.*, 406 F.2d 399 (5th Cir. 1969)	16
EEOC v. *Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975), *petitions for writs of cert. pending*, Nos. 75-220, -221, -239, -393	9
Emporium Capwell Co. v. *Western Addition Community Organization*, 420 U.S. 50 (1975)	13
Franks v. *Bowman Transportation Co.*, No. 74-728, *decided* March 24, 1976, 47 L. Ed. 2d 444	11
Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971)	17
Johnson v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974)	12, 13, 15
Kaplan v. *International Alliance of Theatrical Employees*, 525 F.2d 1354 (9th Cir. 1975)	12

TABLE OF AUTHORITIES—Continued

Page

Local 189, United Papermakers & Paperworkers v. *United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970) 9, 10, 12
Macklin v. *Spector Freight Systems, Inc.*, 156 U.S. App. D.C. 69, 478 F.2d 979 (1973) 13
Myers v. *Gilman Paper Corp.*, 392 F. Supp. 413 (S.D. Ga. 1975), *appeal pending*, 5th Cir. No. 75-2201 14
Oatis v. *Crown Zellerbach Corp.*, 398 F.2d 496 (5th Cir. 1968) 16
Pettway v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974) 9
Quarles v. *Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968) 9, 10, 12
Robinson v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971), *petition for cert. dismissed*, 404 U.S. 1006 (1971) 12
Russell v. *American Tobacco Co.*, 528 F.2d 357 (4th Cir. 1975), *cert. denied*, 48 L. Ed. 2d 176 (Apr. 19, 1976) 12, 15
Sabala v. *Western Gillette, Inc.*, 516 F.2d 1251 (5th Cir. 1975), *petition for writs of cert. pending*, Nos. 75-781 & 75-788 15
Sagers v. *Yellow Freight System, Inc.*, 529 F.2d 721 (5th Cir. 1976) 9, 12
Stevenson v. *International Paper Co.*, 516 F.2d 103 (5th Cir. 1975) 15
Swint v. *Pullman-Standard*, 13 FEP Cases 604 (5th Cir. 1976) 9
Thornton v. *East Texas Motor Freight*, 497 F.2d 416 (6th Cir. 1974) 14
United States v. *Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971) 9, 12
United States v. *Chesapeake & Ohio Railway Co.*, 471 F.2d 582 (4th Cir. 1972), *cert. denied sub nom. Local 268, Brotherhood of Railroad Trainmen* v. *United States*, 411 U.S. 939 (1973) ..... vii, 9

TABLE OF AUTHORITIES—Continued

Page

United States v. *Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972) ..... vii, 9, 10, 12
United States v. *N. L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973) 9, 12, 14
United States v. *St. Louis-San Francisco Railway Co.*, 464 F.2d 301 (8th Cir. 1972), *cert. denied*, 409 U.S. 1116 (1973) *and sub nom. United Transportation Union* v. *United States*, 409 U.S. 1107 (1973) vii
Waters v. *Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 48 L. Ed. 2d 823 (May 24, 1976) 15

*Statutes and Rules:**

Civil Rights Act of 1964, Title VII, Pub. L. 88-352, July 2, 1964, 78 Stat. 253, and as amended by the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, March 24, 1972, 86 Stat. 103:

Section 703(a), 42 U.S.C. (1970 ed. & Supp. V) § 2000e-2(a) 8, 11
Section 703(c), 42 U.S.C. (1970 ed. & Supp. V) § 2000e-2(c) 9, 11, 15
Section 703(h), 42 U.S.C. § 2000e-2(h) 11
Section 706(b), 42 U.S.C. (Supp. V) § 2000e-5(b) 16
Section 706(d), 42 U.S.C. § 2000e-5(d), *as amended*, 42 U.S.C. (Supp. V) § 2000e-5(d) 9
Section 706(f), 42 U.S.C. § 2000e-5(f), *as amended*, 42 U.S.C. (Supp. V) § 2000e-5(f) 9

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* All undesignated references to the U.S. Code are to the 1970 edition.

TABLE OF AUTHORITIES—Continued

	Page
Section 706(g), 42 U.S.C. (Supp. V) § 2000e-5(g)	viii, 14, 15
R.S. § 1977, 42 U.S.C. § 1981	2, 7
Railway Labor Act, 45 U.S.C. § 151 *et seq.*	vi
Supreme Court Rules:	
Rule 23(1)(c)	2
Rule 42	vi

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. 75-651

TEAMSTERS LOCAL UNION 657,
Petitioner,

v.

JESSE RODRIGUEZ ET AL.,
Respondents.

No. 75-715

SOUTHERN CONFERENCE OF TEAMSTERS,
Petitioner,

v.

JESSE RODRIGUEZ ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

MOTION OF THE NATIONAL RAILWAY LABOR CONFERENCE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The National Railway Labor Conference (NRLC) hereby moves, pursuant to Rule 42 of the Rules of this Court, for leave to file the attached brief as *amicus curiae* on the merits of the above-captioned cases. Respondents have consented to the filing of this brief,[1] but petitioners have withheld their consent. Accordingly, NRLC seeks leave of the Court to file its brief.

The NRLC represents almost all of the nation's Class I railroads in national collective bargaining with unions representing employees of those railroads pursuant to the Railway Labor Act, 45 U.S.C. § 151 *et seq.* Under that Act, employees are unionized according to crafts and classes. Even though a given union may represent more than one craft or class of employees, there are generally fifteen or sixteen unions representing the crafts or classes of employees engaged by any single railroad. Over the years, each union in the railroad industry has bargained for and obtained an elaborate seniority system for its members, and each union has jealously guarded the jobs and work of its craft against efforts by the carriers to consolidate the work performed by separate crafts.

For the past several years, the NRLC and the unions have been engaged in industry-wide collective bargaining that is bringing important changes in the seniority systems now in force. Agreements have already been entered into with about one-third of the railroad unions, covering some 45 percent of the industry's employees. In general, the agreements provide opportunities for minority and female employees in designated job classifications to transfer to certain other classifications with "carry-over seniority." That is, the agreements permit the covered employees to use their "company seniority dates," as defined in the agreements, in bidding for vacancies in the new crafts and, after successful transfer,

[1] The consent letters from counsel for respondents are on file with the clerk.

for all purposes for which seniority is relevant under collective bargaining agreements, such as bidding on future vacancies, recall, work shifts, vacations, fringe benefits, and the like. The agreements also give transferring employees "carry-back seniority," pursuant to which the employees are permitted to retain seniority in their old craft for a minimum of 90 days from the date of transfer or from the date of expiration of any probationary or training period in the new craft, whichever is longer. Transfers with carry-over seniority are permitted on a "one-time-only" basis and only to classifications within the jurisdictions of unions that have signed the agreements.

The NRLC believes that these agreements fulfill the requirements of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. (1970 ed. & Supp. V) § 2000e *et seq.*, and satisfy the reasonable goals of the Equal Employment Opportunity Commission and the Office of Federal Contracts Compliance to minimize restraints upon the intercraft or interclass transfers of minority and female workers in the industry. See generally *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972); *United States* v. *St. Louis-San Francisco Railway Co.*, 464 F.2d 301 (8th Cir. 1972), *cert. denied*, 409 U.S. 1116 (1973) *and sub nom. United Transportation Union* v. *United States*, 409 U.S. 1107 (1973); *United States* v. *Chesapeake & Ohio Railway Co.*, 471 F.2d 582 (4th Cir. 1972), *cert. denied sub nom. Local 268, Brotherhood of Railroad Trainmen* v. *United States*, 411 U.S. 939 (1973).

While substantial results have been achieved through voluntary modification of seniority rules by agreement with several unions, the NRLC is concerned about the progress of negotiations with the remaining railroad un-

ions. In the absence of union pressure, the carriers would willingly alter the seniority systems. There is nothing to be gained by a carrier from perpetuation of a seniority system that is arguably discriminatory. It is the unions and the employees protected by existing seniority systems who have a special interest in those systems and who, if a system is found discriminatory, would want to modify the system only to the minimum extent necessary to cure the particular defect.

While the carriers do not have an interest in perpetuating a seniority system that is arguably discriminatory, they have a significant interest in having the unions join with them in altering seniority systems. By unilaterally modifying a seniority system that has been memorialized in collective bargaining agreements, the carriers risk strikes and slowdowns, protracted litigation, and jeopardized relationships with the unions and employees.

For all of these reasons, the NRLC wishes to emphasize to the Court the importance of the general principle that unions as well as employers should be held liable under Title VII for violations embodied in collective bargaining agreements. Without the incentive of avoiding liability under Title VII, and thus avoiding the possibility of back pay awards under Section 706(g) of the Act, unions would have little or no incentive to modify provisions that they have long insisted upon. The briefs of petitioner labor organizations suggest that unions should stand in a different position from employers *vis-à-vis* liability under Title VII, when seniority systems in collective bargaining agreements have been found unlawfully to perpetuate the effects of prior discrimination in hiring. *Amicus* seeks leave to file this brief to respond to this position, which may be given little

attention in the briefs of respondents in view of the many other issues in the case.[2]

Wherefore, the National Railway Labor Conference requests that this Court grant leave to file the accompanying brief as *amicus curiae*.

Respectfully submitted,

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October 13, 1976

[2] This brief is being filed on October 13, 1976, the date that the brief for respondents Rodriguez *et al.* is due (letter from Clerk to Vilma S. Martinez, Esq., September 3, 1976).

IN THE

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OCTOBER TERM, 1976

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BRIEF FOR THE NATIONAL RAILWAY LABOR CONFERENCE AS AMICUS CURIAE

INTEREST OF AMICUS

The interest of the *amicus curiae* is set forth in the attached Motion for Leave to File Brief as Amicus Curiae.

QUESTION PRESENTED

Whether labor organizations are properly liable under Title VII of the Civil Rights Act of 1964, as amended, when they have negotiated or are parties to a collective bargaining agreement, the seniority provisions of which are found to "lock in" the effects of prior discriminatory hiring by the employer.[1]

STATEMENT OF THE CASE

These petitions bring before the Court three related employment discrimination actions, all initiated in the United States District Court for the Western District of Texas, dismissed on the merits after trial on the liability issues, and reversed and remanded for further proceedings by the United States Court of Appeals for the Fifth Circuit. The facts of the cases are discussed in detail in the briefs of the parties and the decisions of the court of appeals; we shall merely summarize here the facts of the principal case, *Rodriguez* v. *East Texas Motor Freight System, Inc.* (ETMF).[2]

Three Mexican-American individuals working as city truck drivers for ETMF in San Antonio, Texas, sued under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. (1970 ed. & Supp. V) § 2000e *et seq.*, and under R.S. § 1977, 42 U.S.C. § 1981, on behalf of themselves and similarly-situated Mexican-American and black individuals, alleging various discriminatory employment practices on the parts of defendants ETMF, Teamsters Local Union 657 (petitioner in No. 75-651), and the

[1] *Amicus* believes that this question is "fairly comprised" in the questions stated by the petitioners. Supreme Court Rule 23(1)(c).

[2] 505 F.2d 40 (5th Cir. 1974). The other two cases are *Herrera* v. *Yellow Freight System, Inc.*, 505 F.2d 66 (5th Cir. 1974), and *Resendis* v. *Lee Way Motor Freight, Inc.*, 505 F.2d 69 (5th Cir. 1974).

Southern Conference of Teamsters (petitioner in No. 75-715).[3]

Prior to 1970, ETMF had never employed a black or Mexican-American as a road driver in the area of Texas covered by the Southern Conference. (A. 73-74.) Approximately 35 percent of ETMF's city drivers in Texas are black or Mexican-American. (A. 74.) The brunt of plaintiffs' case below against ETMF was that Mexican-American and black city drivers were discriminatorily locked into the city driver jobs and prevented or discouraged from transferring to the more desirable road driver jobs by the "no transfer" policy in effect at ETMF. That policy was explained by the court of appeals as follows:

> "Since 1954 ETMF has followed a 'no-transfer' policy, prohibiting the transfer of drivers between city and road driver classifications and between terminals. [Footnote omitted.] Under the policy, in order for a city driver to obtain a position as a road driver, he must resign his city driver job and apply for a road driver slot. He thereby forfeits all accumulated seniority. * * * For the purposes of strengthening his application, he gains no 'credit' for his years as a city driver. And if his bid to be a line driver fails, there is no guarantee that he will be rehired as a city driver." A. 72.

The court of appeals went on to relate the company's no-transfer policy to the seniority provisions in the existing collective bargaining agreements, which were the crux of plaintiffs' case against the unions (A. 99). Teamsters Local 657, of which plaintiffs in the underlying action were members, represents city drivers employed by

[3] The employer, ETMF, is the petitioner in No. 75-718; this Court has granted that petition and consolidated that case for argument with Nos. 75-651 and 75-715, the cases brought to this Court by the labor organizations (order dated May 24, 1976). This *amicus*, however, is addressing an issue presented only by the labor organization petitions.

ETMF and other employers in certain Texas counties (A. 423); it represents no road drivers.[4] The court said:

> "ETMF's policy against transfers is complemented by the fact that under collective bargaining contracts between ETMF and Local unions, including the defendant Local 657, city drivers who transfer to the road do not carry over their 'competitive-status' seniority, that is, seniority for job bidding and lay off purposes. [Footnote omitted]. Under separate collective bargaining agreements for road and city drivers, competitive-status seniority runs from the time an employee enters a particular collective bargaining unit. Transfer is not expressly prohibited, but it is not expressly permitted either, and the agreements have been universally interpreted to prohibit the carryover of seniority from one classification to another." A. 72-73.

ETMF's no-transfer policy was modified for thirty days in January and February of 1972 to permit city-drivers at terminals which also employed road drivers to transfer to road driver jobs if they could meet certain requirements. Even under the modification, however, any city driver transferring to the road still lost his seniority for job bidding and lay off purposes. (A. 73.)

After trial on the liability issues, the district court denied plaintiffs all relief and dismissed the complaint on the merits. (A. 55-67.) Although it found that the individual plaintiffs were not qualified to hold road driver jobs in any event (A. 23), it found the company's no-transfer policy and the separate seniority rosters to be

[4] The Southern Conference of Teamsters is the bargaining agent of local unions—both city and road locals—in a ten-State area that includes Texas. It negotiated the separate agreements for city and road drivers that contain the seniority provisions at issue in this case. The details of the negotiating arrangements between the local unions, the Southern Conference, and the International Brotherhood of Teamsters, are explored in the court of appeals opinion (A. 98-99) and in the briefs of the parties.

reasonable and proper and accordingly found that defendants "did not discriminate against the plaintiffs or any other employee or Union member on the basis of race or otherwise." (A. 65.) It further concluded that the action was not a proper class action. (A. 66.)[5]

The court of appeals reversed the judgment of the district court and remanded for further proceedings. A. 68-111; 505 F.2d 40 (5th Cir. 1974). It found the dismissal of the class action claims erroneous, ordering that on remand the class considered for relief should be defined as all of ETMF's Mexican-American and black city drivers included under the collective bargaining agreement entered into between ETMF and the Southern Conference of Teamsters covering the State of Texas. (A. 83.)

Turning to the liability issues, the court found that plaintiffs, by their statistical evidence on the absence of minority road drivers, had established a prima facie case of discrimination in hiring, and that ETMF had failed to rebut that case. (A. 90.) It went on:

> "The conclusion is inescapable that both the no-transfer policy and the maintenance of dual seniority rosters, one for city drivers and one for line drivers, have perpetuated ETMF's past discriminatory hiring practices. Together, they have removed all realistic opportunity for transfer." A. 90.

The court rejected ETMF's efforts to justify the no-transfer policy in terms of business necessity. (A. 92-93.) It further rejected ETMF's defense of the dual seniority system—as preferred by minority city drivers (A. 93) or as not amenable to unilateral change by ETMF. (A. 93-94.) Finally, it rejected ETMF's argument that plaintiffs had failed to show that any of the plaintiff class met ETMF's road driver qualifications. (A. 94-97.)

[5] We have not tried to present or summarize the stipulations entered into before and during trial. Their significance—as to the precise issues to be decided—is the subject of dispute among the parties, and we do not enter that dispute.

Turning to the union defendants, petitioners here, the court held that "[f]or their role in continuing the effect" of the discrimination against minority city drivers "that closed out the possibility of their being hired originally as road drivers," "the union defendants must share the blame and the liability." (A. 99.) It rejected the justification that petitioners were "merely following the desires of the majority of their black and Mexican-American members" (A. 100), and announced that the availability of the reasonable alternative of a one-time-only transfer with seniority carryover vitiated the unions' business necessity defense. (A. 101.)

The court remanded the case for consideration of the question of remedy, directing that minority city drivers with three years' experience at city driving must be permitted to transfer to road vacancies, unless they failed to meet other nondiscriminatory qualifications essential for safety or efficiency. (A. 103.) Those city drivers who transfered were to carry with them seniority from the date that they acquired the experience necessary to qualify them for road driivng. (A. 105-07.) No view was intimated as to the apportionment of back pay awards among the three defendants. (A. 107-08.)

ARGUMENT

Labor Organizations Are Properly Held Liable Under Title VII When They Have Negotiated or Signed a Collective Bargaining Agreement, the Seniority Provisions of Which "Lock in" the Effects of Prior Discriminatory Hiring by the Employer.

I

In the cases before the Court, the seniority provisions in the collective bargaining agreements covering road and city drivers at ETMF were found to "lock in" the effects of prior discriminatory hiring by the employer, by discouraging transfers between city and road driver jobs. Accordingly, the court of appeals held both the employer and the unions to be liable under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. (1970 ed. & Supp. V) § 2000e *et seq.*, and remanded for consideration of remedy. The petitioner labor organizations contend that this holding was erroneous as to the unions for a variety of reasons, many closely tied to the facts and trial proceedings in the particular cases before the Court.

Amicus National Railway Labor Conference (NRLC) does not desire to enter into the disputes over many of the issues briefed by the parties. In particular, we do not discuss here the class action issues,[6] any matter pertaining to liability under R.S. § 1977, 42 U.S.C. § 1981,[7] the arguments that the seniority provisions had no effect of discouraging transfers because of the employer's own flat no-transfer policy,[8] the arguments peculiar to the local's limited jurisdiction over city and not road drivers,[9] and the arguments involving the significance of the desires of a majority of the local union.[10] Nor do we discuss the factual and legal argument that these particular seniority provisions did not lock-in the effects of prior discriminatory hiring because the collective bargaining agreements themselves, properly read and construed, permit and even require the granting of "rightful place" seniority to indi-

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[6] Both labor organizations adopt by reference the arguments on the class action issues in the Brief for Petitioner ETMF in No. 75-718. Brief for Petitioner Teamsters Local 657 at 4 n. 1; Brief for Petitioner Southern Conference at 2 n. 2.

[7] Both Teamsters Local 657 and the Southern Conference included references to 42 U.S.C. § 1981 in the questions presented in their petitions, but do not separately brief the construction and application of Section 1981.

[8] Brief for Petitioner Southern Conference at 18-23.

[9] Brief for Petitioner Teamsters Local 657 at 16-18.

[10] Brief for Petitioner Teamsters Local 657 at 22-23.

vidual employees previously discriminated against.[11] *Amicus* files this brief in support of the ruling below that when an employer is liable under Title VII because of seniority provisions in collective bargaining agreements, then the union that signed or negotiated those agreements must be held liable as well.

II

The court of appeals held the employer liable both for its no-transfer policy and for the separate seniority rosters for road and city drivers in the collective bargaining agreements, on the ground that both the policy and the seniority rules perpetuated the effects of past discrimination in hiring. (A. 84-87.) Thus, the court necessarily found that the dual seniority system constituted an "unlawful employment practice" on the part of the employer under Section 703(a) of the Civil Rights Act of 1964.[12] In so doing, the court of appeals followed a long line of lower court cases that have stated that seniority provi-

[11] Brief for Petitioner Teamsters Local 657 at 22; Brief for Petitioner Southern Conference at 29-30 & 33. See also Brief for Petitioner International Brotherhood of Teamsters in Nos. 75-636, *International Brotherhood of Teamsters* v. *United States*, and 75-672, *T.I.M.E.-D.C.* v. *United States*, (consolidated) at 42-43 (related cases now before the Court). Closely involved is the argument that minority employees never filed grievances with their unions. Brief for Petitioner Teamsters Local 657 at 21; Brief for Petitioner Southern Conference at 33.

[12] Section 703(a), 42 U.S.C. (1970 ed. & Supp. V) § 2000e-2(a), provides:

> "It shall be an unlawful employment practice for an employer—
>
> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

sions that lock in the effects of past discrimination constitute separate and continuing violations of Title VII.[13]

Having made that determination with respect to the employer, the court of appeals passed with little trouble to the conclusion that the union defendants—which had negotiated or signed the agreements at issue—were liable as well. That is, the court necessarily found that the separate seniority provisions also constituted an "unlawful employment practice" on the part of the unions under Section 703(c) of the Act.[14]

[13] *E.g.*, *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968); *Local 189, United Papermakers & Paperworkers* v. *United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972); *Bing* v. *Roadway Express, Inc.*, 485 F.2d 441 (5th Cir. 1973); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974); *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971); *United States* v. *Chesapeake & Ohio Railway Co.*, 471 F.2d 582 (4th Cir. 1972), *cert. denied sub nom. Local 268, Brotherhood of Railroad Trainmen* v. *United States*, 411 U.S. 939 (1973); *United States* v. *N. L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973); See also *EEOC* v. *Detroit Edison*, 515 F.2d 301 (6th Cir. 1975), *petitions for writs of cert. pending*, Nos. 75-220, -221, -239, -393; *Sagers* v. *Yellow Freight System, Inc.*, 529 F.2d 721 (5th Cir. 1976); *Swint* v. *Pullman-Standard*, 13 FEP Cases 604 (5th Cir. 1976). Unless the allegedly discriminatory exclusion from road jobs was a separate and continuing violation, or resulted from separate and recurring instances of refusal to allow transfer, there would apparently have been no subject-matter jurisdiction under Section 706(d) and -(f), 42 U.S.C. (1970 ed.) §§ 2000e-5(d) & -(f), since the plaintiffs filed their EEOC charges years after the dates of their initial hirings. (A. 8-14.)

[14] Section 703(c), 42 U.S.C. (1970 ed. & Supp. V) § 2000e-2(c), provides:

> "It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer

Petitioner Southern Conference argues at length in its brief that the court of appeals misapplied early lower court cases on the validity of seniority provisions in collective bargaining agreements in holding the unions liable in this case.[15] It cites specifically *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 218 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972); *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); and *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968). The Southern Conference distinguishes those cases from the instant case in several different ways:

> (1) That the seniority rules at issue here "have no origin in nor do they represent an intention to discriminate";
>
> (2) That the unions here have never been segregated upon racial or ethnic lines;
>
> (3) That there is no line of progression between city and road jobs, and city jobs are not menial, low-paying, or otherwise necessarily less desirable jobs than road jobs; and
>
> (4) That the collective bargaining provisions themselves, properly read and construed, prohibit racial or ethnic discrimination and provide a means for employees to obtain "rightful place" seniority upon a showing of such discrimination.[16]

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for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

"(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section."

[15] Brief for Petitioner Southern Conference at 27-36.

[16] See Brief for Petitioner Southern Conference at 29-30.

The Southern Conference argues that these considerations, taken in light of the "bona fide seniority * * * system" provision of Section 703(h) of the Act[17] and this Court's recent decision in *Franks* v. *Bowman Transportation Co.*,[18] absolve the unions from liability.

Whatever the force of this argument by the Southern Conference, it is significant for *amicus's* purposes that it does not offer a justification for absolving the unions under Section 703(c) while leaving the company liable under Section 703(a). Neither the district court nor the court of appeals found that the company, as opposed to the unions, had accepted the continued operation of the separate road and city driver seniority systems with the intention of continuing to injure prior victims of discrimination in hiring. Petitioner's remaining points, we believe, support only the proposition that the seniority provisions cannot be said unlawfully to "lock in" the effects of prior discriminatory hiring. And if that proposition is correct, then the conclusion must be that neither the unions *nor the employer* violated the Act by continuing the operation of the seniority provisions that are challenged.

Petitioner Southern Conference, therefore, attempts to disassociate the unions from the employer primarily on the ground that the seniority provisions in this case

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[17] Section 703(h), 42 U.S.C. § 2000e-2(h), provides:

> "Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, * * *."

[18] No. 74-728, decided March 24, 1976, 47 L.Ed. 2d 444.

had no practical effect on plaintiffs at all, because of the ETMF's no-transfer policy.[19] Petitioner Teamsters Local 657 has an assortment of arguments revolving around its limited jurisdiction and role in negotiating the agreements. We have left these contentions to the parties. For the consideration of petitioners' arguments, however, *amicus* believes that the importance of the general principle that unions share liability with employers for violations embodied in collective bargaining agreements must not be overlooked.

III

The principle that unions as well as employers are liable under Title VII for violations embodied in collective bargaining agreements has commanded widespread acceptance in the lower courts.[20] It found succinct—and often quoted—expression in *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971), *petition for cert. dismissed*, 404 U.S. 1006 (1971):

> "The rights assured by Title VII are not rights which can be bargained away—either by a union, by an employer, or by both acting in concert. Title VII requires that both union and employer represent and protect the best interests of minority employees. Despite the fact that a strike over a

[19] Brief for Petitioner Southern Conference at 18-23.

[20] The early cases generally cited are *Quarles* v. *Philip Morris, Inc.*, 279 F.Supp. 505 (E.D. Va. 1968); *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972); *Local 189, United Papermakers & Paperworkers* v. *United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); and *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971). Some important recent cases are *United States* v. *N. L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974); *Russell* v. *American Tobacco Co.*, 528 F.2d 357 (4th Cir. 1975), *cert. denied*, 48 L.Ed. 2d 176 (Apr. 19, 1976); *Sagers* v. *Yellow Freight System, Inc.*, 529 F.2d 721 (5th Cir. 1976); *Kaplan* v. *International Alliance of Theatrical Employees*, 525 F.2d 1354 (9th Cir. 1975).

> contract provision may impose economic costs, if a discriminatory contract provision is acceded to the bargainee as well as the bargainor will be liable." 444 F.2d at 799 (footnote omitted).

To impose liability upon both parties to an unlawful collective bargaining agreement does no more than hold both liable for the foreseeable effects of their own deliberate actions. In *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1381 (1974), the Court of Appeals for the Fifth Circuit addressed a union's argument that "the mere fact that it was a party to a discriminatory collective bargaining agreement is legally insufficient" to impose liability upon the union.[21] The court observed that the union "must have known precisely what effect the incorporation of the departmental seniority provisions in the collective bargaining agreement would have on [affected] employees." It concluded: "Common sense demands that a union be held to the natural consequences of its labor in negotiating a collective bargaining agreement." *Id.* See also *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50, 70 (1975): "When union and employer are not responsive to their legal obligations [under Title VII], the bargain they have struck must yield *pro tanto* to the law * * *." [22]

[21] In the *Johnson* case the union was appealing an award of backpay, but its argument clearly relates to the underlying liability under Section 703(c).

[22] Lower courts have also indicated that unions may be held liable for "acquiescing" in an unlawful employment practice not embodied in a collective bargaining agreement with that union, or for failing to negotiate for the cessation of such a practice. See, *e.g.*, *Macklin* v. *Spector Freight Systems, Inc.*, 156 U.S. App. D.C. 69, 478 F.2d 979, 989 (1973) ("A union's duty, in representing its members and protecting them from invidious treatment, must certainly be broader than simply refusing to sign overtly discriminatory agreements. * * * [T]acit union acquiescence in an employer's discriminatory practices effectively produces the same end result that was condemned in *Steele* [v. *Louisville & Nashville R. Co.*, 323 U.S. 192 (1944)]."); *Carey* v. *Greyhound Bus Co.*, 500

The imposition of liability upon unions as well as employers is necessary if the prophylactic and compensatory purposes of back pay awards, recently discussed by the Court in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), are to be served. As the Court noted in *Albemarle*,

> "If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that 'provide[s] the spur or catalyst which causes employers *and unions* to self-examine and self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.' *United States* v. *N. L. Industries, Inc.*, 479 F.2d 354, 379 (CA 8 1973)." 422 U.S. at 417-18 (emphasis added).

In particular cases, there may be equitable considerations that should determine the apportionment of any back pay award under Section 706(g) of the Act[23] in favor of the employer or in favor of the union. There is a developing body of case law on the issue of what portion

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F.2d 1372, 1379 (5th Cir. 1974); *Myers* v. *Gilman Paper Corp.*, 393 F. Supp. 413, 421-22 (S.D. Ga. 1975), *appeal pending*, 5th Cir. No. 75-2201. But *cf. Thornton* v. *East Texas Motor Freight*, 497 F.2d 416, 424-26 (6th Cir. 1974).

[23] Section 706(g), 42 U.S.C. (Supp. V) § 2000e-5(g), provides:

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. * * *"

of a back pay award should be paid by unions,[24] but the equitable considerations applicable under Section 706(g) come into play only after a determination of liability under Section 703(c). They are not at issue in this case, where trial on remedy has not yet been held. However, the acknowledgment in *Albemarle* of the practical importance of the *possibility* of back pay awards applies precisely to the liability issue discussed here.

As representative of the railroad industry in collective bargaining with national labor organiaztions, *amicus* is well aware that established seniority systems are a subject of great concern to labor. There is little to be gained by any employer in the perpetuation of a seniority system that is arguably discriminatory. Seniority systems are generally the creature of collective bargaining, instituted at union's insistence and altered only over their strenuous objections. Without the strong incentive of avoiding liability under Section 703(c)—and thus avoiding the possibility of back pay awards under Section 706(g)—unions would have little or no incentive to modify provisions they have long bargained for. And without that incentive, efforts to secure the Title VII rights of individual employees at the bargaining table would be frustrated.

The voluntary modification of seniority and other provisions of collective bargaining agreements is the most desirable method of granting relief to individuals who are the victims of discrimination in hiring. The alternatives are the further crowding of discrimination claims

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[24] *E.g., Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974); *Carey* v. *Greyhound Bus Co.*, 500 F.2d 1372 (5th Cir. 1974); *Waters* v. *Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 48 L.Ed. 2d 823 (May 24, 1976); *Stevenson* v. *International Paper Co.*, 516 F.2d 103 (5th Cir. 1975); *Sabala* v. *Western Gillette, Inc.*, 516 F.2d 1251 (5th Cir. 1975), *petitions for writs of cert. pending*, Nos. 75-781 & 75-788; *Russell* v. *American Tobacco Co.*, 528 F.2d 357 (4th Cir. 1975), *cert. denied*, 48 L.Ed. 2d 176 (Apr. 19, 1976).

based on collective bargaining agreements into already overcrowded courts, or the accommodation of individual employees to the discrimination that Title VII is designed to eliminate. The policy favoring voluntary solutions to employment discrimination problems is embodied in the statute itself [25] and has often been remarked on in the lower courts. See *Oatis* v. *Crown Zellerbach Corp.*, 398 F.2d 496 (5th Cir. 1968): "[I]t is thus clear that there is great emphasis in Title VII on private settlement and the elimination of unfair practices without litigation." See also *Dent* v. *St. Louis-San Francisco Railway Co.*, 406 F.2d 399, 402 (5th Cir. 1969):

> "Thus it is quite apparent that the basic philosophy of these statutory provisions is that voluntary compliance is preferable to court action and that efforts should be made to resolve these employment rights by conciliation both before and after court action."

And in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), this Court said:

> "Cooperation and voluntary compliance were selected as the preferred means for achieving [the elimination of employment discrimination]. To this end, Congress created the Equal Employment Opportunity Commission and established a procedure whereby existing State and local equal employment opportunity agencies, as well as the Commission, would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit." 415 U.S. at 44.

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[25] Section 706(b), 42 U.S.C. (Supp. V) § 2000e-5(b), provides that the Equal Employment Opportunity Commission, when it finds reasonable cause to believe that a charge filed with it is true, "shall endeavor to eliminate any * * * alleged unlawful employment practice by informal methods of conference, conciliation and persuasion."

Employers alone cannot modify offending seniority provisions without risking strikes and slowdowns, protracted litigation, and jeopardized relationships with the unions and employees. Thus, absent the incentive of avoiding backpay awards, unions reluctant to modify long-established seniority systems can seriously undermine the statutory policy of voluntary elimination of employment discrimination.

The policies of Title VII, recognized by this Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), *Alexander* v. *Gardner-Denver*, *supra*, and in *Albemarle Paper Co.* v. *Moody*, *supra*, require that when an employer is held liable under Title VII because the seniority provisions in a collective bargaining agreement perpetuate the effects of prior discrimination, the unions which have signed and negotiated those provisions be held liable as well.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed insofar as it holds the union defendants liable under Title VII.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1975

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Petitioner

v.

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Respondents

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v.

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Petitioner

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Respondents

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

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TABLE OF CONTENTS

	Page
INTEREST OF THE AMICUS CURIAE	2
PRELIMINARY STATEMENT	3
ARGUMENT	6
I. The Court of Appeals' Failure to Recognize the Deficiencies and Dangers Inherent In Its Reliance Upon the Statistical Parity Theory Resulted In An Erroneous Conclusion of Liability In Favor of the Class	6
A. The Deficiencies and Dangers in Relying Solely Upon Workforce Statistics to Establish a *Prima Facie* Case	6
B. The Proper Role of Statistics In Identifying Victims of Discrimination	12
C. The Court's Misplaced Reliance on Statistics Resulted In An Erroneous Determination That All Members of the Purported Class Were Victims of Discrimination	15
II. The Court of Appeals' Reversal of the Class Action Dismissal and Its *Sua Sponte* Certification of the Class Is Not Supported by the Record and Is Contrary to Rule 23 of the Federal Rules of Civil Procedure	20
CONCLUSION	32

AUTHORITIES CITED

Cases: Page

ACHA v. *Beame*, 531 F.2d 648 (2d Cir. 1976) 14
Air Line Stewards and Stewardess Ass'n. v. *American Airlines*, 490 F.2d 636 (7th Cir. 1973) 30
Albemarle Paper Co. v. *Moody*, 422 U.S. 405 (1975) 19
American Pipe and Construction Co. v. *Utah*, 414 U.S. 538 (1974) 23
Baxter v. *Savannah Sugar Refining Corp.*, 495 F.2d 437 (5th Cir. 1974) 19
Blankenship v. *Wometco Blue Circle, Inc.*, 59 FRD 308 (E.D. Tenn. 1972) 28
Bowe v. *Colgate Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969) 9
Coopersmith v. *Roudebush*, 517 F.2d 818 (C.A.D.C. 1975) 12
Donaldson v. *Pillsbury Co.*, 11 FEP Cases 577 (D. Minn. 1975) 27
EEOC v. *Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975), pet. for cert. pending in Case No. 75-720 19
Franks v. *Bowman Transportation, Co.*, 47 L.Ed.2d 444 (1976) 5, 14
Gerstle v. *Continental Airlines, Inc.*, 406 F.2d 1374 (10th Cir. 1972) 31
Green v. *Missouri Pacific R.R. Co.*, 523 F.2d 1290 (8th Cir. 1975) 19
Gresham v. *Ford Motor Co.*, 53 FRD 105 (N.D. Ga. 1970) 28
Griggs v. *Duke Power Co.*, 401 U.S. 421 (1971) ..12, 18, 32
Hairston v. *McLean Trucking Co.*, 520 F.2d 226 (4th Cir. 1975) 19
Harper v. *Trans World Airlines, Inc.*, 525 F.2d 409 (8th Cir. 1975) 7
Hester v. *Southern Railway Co.*, 497 F.2d 1374 (5th Cir. 1974) 3, 13
Johnson v. *Georgia Highway Express*, 417 F.2d 1122 (5th Cir. 1969) 28

AUTHORITIES CITED—Continued

Page

Johnson v. *Railway Express, Inc.*, 421 U.S. 454 (1975) 9
Kaplan v. *IATSE*, 7 FEP Case 895 (C.D. Cal. 1973) 25
Kinsey v. *Legg, Munson & Co., Inc.*, 60 F.R.D. 91 (D.D.C. 1973) 25, 28
Marshall v. *Target Stores, Inc.*, 11 FEP Cases 775 (E.D. Mo. 1975) 27
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792, 805 (1973) 6-8, 13, 16-19
Norman v. *Missouri Pacific R.R. Co.*, 497 F.2d 594 (8th Cir. 1974) 19
O'Brien v. *Shimp*, 356 F. Supp. 1259 (N.D. Ill. 1973) 28
Patterson v. *General Motors Corp.*, 10 FEP Cases 921 (N.D. Ill. 1974) 26-27
Peltier v. *City of Fargo*, 10 FEP Cases 701 (D.N.D. 1975) 27
Poindexter v. *Teubert*, 462 F.2d 1096 (4th Cir. 1972) 23, 25
Robinson v. *City of Dallas*, 514 F.2d 1271 (5th Cir. 1975) 17
Rockett v. *Lyman*, 12 FEP Cases 224 (D. HAW. 1974) 28
Rodriguez v. *East Texas Motor Freight*, 6 FEP Cases 45 (W.D. Tex. 1973) 8, 10
Smith v. *Liberty Mutual Ins. Co.*, 11 FEP Cases 734 (N.D. Ga. 1974) 25
Sprogis v. *United Airlines, Inc.*, 444 F.2d 1194 (7th Cir. 1971) 23
Taylor v. *Safeway Stores, Inc.*, 524 F.2d 263 (10th Cir. 1975) 23
Thompson v. *Sun Oil Co.*, 523 F.2d 647 (8th Cir. 1975) 25, 27
Thornton v. *East Texas Motor Freight*, 497 F.2d 416 (6th Cir. 1974) 14, 31
Tyler v. *Vickery*, 517 F.2d 1089 (1975), cert. denied, No. 75-1026, June 14, 1976 12

AUTHORITIES CITED—Continued

	Page
Villarreal v. *Braswell Motor Freight Lines*, 11 FEP Cases 831 (S.D. Tex. 1975)	25
Washington v. *Davis*, 12 FEP Cases 1415 (U.S. 1976)	11, 19
Watkins v. *Steelworkers*, 516 F.2d 41 (5th Cir. 1975)	10
Winfrey v. *General Motors Corp.*, 11 FEP Cases 649 (N.D. Ga. 1974)	24
Wright v. *Stone Container Corp.*, 524 F.2d 1058 (8th Cir. 1975)	18, 27

STATUTES AND OTHER AUTHORITIES:

Rule 23, Federal Rules of Civil Procedure	4, 5, 22-23, 27-28, 32
23(b)(2)	30
23(b)(3)	30
23(c)(1)	20-22, 31
23(c)(2)	30
23(d)(2)	30
Title VII of the Civil Rights Act of 1964	3-5, 9-11, 13, 17, 21-22, 24, 31, 32
§ 706(e)	20
§ 2000e-5(e)	9
42 U.S.C. § 1981	9

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

The Equal Employment Advisory Council ("EEAC") respectfully submits this brief as *amicus curiae* in Case No. 75-718. The EEAC supports the position of the Respondent East Texas Motor Freight System, Inc. ("ETMF") in urging the Court to reverse the decision of the Fifth Circuit Court of Appeals.[1] Written consent to filing this *amicus curiae* brief has been obtained from all parties and filed with the Court Clerk.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council is a voluntary nonprofit association organized as a corporation under the laws of the District of Columbia. EEAC was founded to represent and promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations whose employer-members have a common interest in the foregoing purpose. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity, whose combined experience gives the

[1] The EEAC has also filed a brief *amicus curiae* in the case of *T.I.M.E.-DC, Inc.* v. *United States*, No. 75-672, which also involves the proper role of statistics in a Title VII class action —the principal issue discussed herein. Accordingly, many of the points in this brief are the same as discussed in the brief in the *T.I.M.E.-DC* case. The parties in the *T.I.M.E.-DC* case have been served with copies of this brief.

Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially all of EEAC's members, or their constituents, are subject to the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1981 and the various other Federal orders and regulations pertaining to nondiscriminatory employment practices. As such, they have a direct interest in the issues presented for the Court's consideration in this case.

PRELIMINARY STATEMENT

Based solely on its finding of the absence of statistical parity for blacks and Mexican-Americans in the line driver's position, the Court of Appeals held that the defendants had discriminated against a class consisting of all Mexican-American and black city drivers employed by ETMF in the State of Texas. This class finding was in direct contravention of the parties' agreement at the commencement of trial that "the *only issue* presently before the Court pertaining to the company is whether the failure of the Defendant ETMF to consider Plaintiffs' line driver applications constituted a violation of Title VII and 42 U.S.C. § 1981." Accordingly, no evidence other than statistics was presented on the issue of whether the Company discriminated against any person other than the three named plaintiffs.

It is submitted that a statement by another panel of the Fifth Circuit Court of Appeals in *Hester* v. *Southern Railway Co.*, 497 F.2d 1374, 1381 (5th Cir.

1974) accurately characterizes the Court of Appeals' treatment of the record in this case:

> "We recognize that statistics are a powerful tool in the hands of a Title VII plaintiff, but we are also aware that undue emphasis on their use may obscure rather than advance the judicial process." (footnote omitted)

In particular, the inherent deficiencies in the Court of Appeals' statistical parity approach to the class liability issue, and its undue reliance on statistics, yielded the following improper results:

1. Even though the plaintiffs' claims of individual discrimination were rejected by the district court, the defendants were deprived of the right to present evidence in defense of the charge that there were other alleged victims of discrimination.

2. The Court of Appeals' adherence to workforce statistics combined with its presumption that Title VII cases are "inherently class suits" caused it to make a class determination without a meaningful consideration of the factors required under Rule 23 of the Federal Rules of Civil Procedure.

3. The Court of Appeals invaded the province of the district court to consider all facts relevant to the determination of class certification and the issue of liability to the members of the purported class.

The issue of the proper role of statistics in a Title VII class action is now before this Court for the first

time. No issue is more crucial to rational and effective enforcement of the equal employment opportunity enactments. The standards which this Court adopts will not only affect the result in this case, but will have a far reaching effect in cases arising in different factual contexts.

When properly employed, statistics provide a relevant factor for determining whether discrimination has occurred. This Court has heretofore adhered to the principle that the objectives of Title VII are to determine (1) whether there are *identifiable* victims of discrimination entitled to relief and (2) if so, who are those victims and what remedy is appropriate to make them whole. *E.g.*, *Franks* v. *Bowman Transportation Co.*, 47 L.Ed.2d 444 (1976).

These objectives can be achieved only if (1) statistics are assigned their proper role in the allocation of the burden of proof, (2) the prerequisites for Rule 23 class certification are properly applied, and (3) sufficient authority is left to the fact finder to make adjustments based upon the nature of the discrimination alleged, the victims identified, the remedies sought and the other facts surrounding the particular claim at issue. These guidelines were not followed in this case and, accordingly, it is to these issues that the following is directed.

ARGUMENT

I. The Court of Appeals' Failure to Recognize The Deficiencies and Dangers Inherent In Its Reliance Upon The Statistical Parity Theory Resulted In An Erroneous Conclusion of Liability In Favor of the Class.

A. *The Deficiencies and Dangers In Relying Solely Upon Workforce Statistics to Establish a* Prima Facie *Case.*

In *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973), this Court held that the plaintiff must show the following to establish a *prima facie* case:

> "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." (footnote omitted)

Once such a *prima facie* case is established, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." The burden then shifts back to the plaintiff to show that the stated reason for the rejection is pretextual. (411 U.S. at 804).

Among the factors that may be relevant to show that the stated reason is pretextual is the petitioner's general policy with respect to minority employment. As to this factor, this Court stated that "statistics . . . may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks." 411 U.S. at 805. But this

Court cautioned that general determinations based on the racial composition of the employer's workforce while helpful, "may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to rehire." 411 U.S. at 805, n. 19.

As noted, pursuant to the stipulation of the parties, the *only* issue litigated at the trial in the case was whether the *three named plaintiffs* were discriminated against because their applications for line driver positions filed in 1971 were not considered by ETMF.[2] In effect, therefore, this case was tried as a *McDonnell Douglas* case.

Based primarily on the poor driving and safety records of plaintiffs as city drivers, the district court concluded that the plaintiffs failed to prove their claim of discrimination because they had not shown they were qualified for road driver positions. [Findings 20-23]. Thus, under the *McDonnell Douglas* standard there was a justifiable reason for refusing to hire and the workforce statistics were not controlling. It is submitted that the Court of Appeals had

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[2] The three plaintiffs also stipulated that when they were hired at ETMF's San Antonio terminal (in 1959, 1964 and 1965, respectively) they were employed "without regard to race, color, religion or national origin." It was also undisputed that the San Antonio terminal had never domiciled road drivers but was operated exclusively as a local, city-wide pick-up and delivery service. Further, as ETMF notes in its brief, the nearest company facility at which road drivers were employed was approximately 240 miles from San Antonio. Moreover, it was not contended that the "no transfer rule" was *per se* illegal (505 F.2d at 53).

no basis for concluding that this finding was clearly erroneous.

What is important to note as to the class issue, however, is that despite the stipulation limiting the issue at trial to the individual claims, the Court of Appeals held, *sua sponte*, that liability in favor of *all* minority city drivers had nonetheless been established.[3] This conclusion was based solely on the statistical underrepresentation of minorities in road driver positions. There was *no proof* that any other purported class member had ever applied for or was qualified (under whatever standard might be appropriate) for a road driver position. Thus, even though there was *no evidence* that any of the other city drivers could establish a *prima facie* case under the *McDonnell Douglas* standard, they were nonetheless found to have been victims of discrimination. The illogic of this reasoning is apparent: under the Court of Appeals' decision a person can gain a judgment of discrimination in his favor if he is a member of a class, even though he would not be entitled to such a judgment if he brought the action as an individual.

In effect, what the Court of Appeals did in this case was to make *two* conclusions based upon the workforce statistics. First, it found that workforce statistics alone were evidence of "past discrimination". Second, it then presumed, *without any further evidence*, that all members of the purported class suffered a legally cognizable injury which entitled

[3] And as noted below, pp. 20-21, the district court also ruled that "at no time" had the plaintiffs moved for a prompt determination of whether or not this was a class action, and "offered no credible proof on this issue." See *Rodriguez* v. *East Texas Motor Freight*, 6 FEP Cases 45, 49 (W.D. Tex. 1973).

them to relief. It is this jump to the second finding which is particularly contrary to the basic objective of fairly and accurately identifying the victims of discrimination and which is most likely to result in preferential remedial awards which may conflict with the objectives of the Act.

It is submitted that, in addition to statistics alone, there are several factors which must be considered when determining whether or not discrimination has occurred. Blanket acceptance of the Court of Appeals' approach often will bring about unsatisfactory results. For example, workforce percentages include all persons in the position at issue, regardless of when they were hired or promoted into the position. Often, it can be established that a significant percentage of the vacancies filled which are represented by the workforce percentages were filled prior to the effective date of Title VII. Similarly, a proper application of the appropriate statutes of limitation should restrict the courts to an examination of those acts of discrimination which have been timely raised. But many of the positions which make up workforce statistics may have been filled prior to the limitations cut-off date.[4] Thus, the workforce statistics are not

[4] The filing of a timely EEOC charge is a jurisdictional prerequisite to suit under Title VII. *E.g., Bowe* v. *Colgate Palmolive Co.*, 416 F.2d 711, 719 (7th Cir. 1969). Section 706(e) of Title VII provides that the charge must be filed within 180 days of the alleged violation (or 300 days in states with state laws prohibiting discrimination). 42 U.S.C. § 2000e-5(e). Thus, any Title VII claim accruing more than 180 days (or 300 days) prior to the date the EEOC charge is filed is barred. The most appropriate state statute of limitations is applicable to claims under 42 U.S.C. § 1981. *Johnson* v. *Railway Express, Inc.*, 421 U.S. 454 (1975).

always a reliable indicator of whether the members of the purported class have been legally recognizable victims of discrimination during the relevant period at issue.

One case which demonstrates the fallacy of relying on unevaluated statistics is *Watkins* v. *Steelworkers*, 516 F.2d 41 (5th Cir. 1975) decided by the Fifth Circuit subsequent to *Rodriguez*. There the district court found liability in favor of the entire class of black incumbent employees because the operation of a seniority system resulted in the employer's workforce being virtually all white. This, in turn, led to a remedial order requiring quotas to achieve statistical parity. The Court of Appeals rejected this result because, despite the absence of blacks in the workforce, there was no evidence that the class members "had suffered individual discrimination at the hands of the Company" (516 F.2d at 46). As the court stated further:

> "To hold the seniority plan discriminatory as to the plaintiffs in this case requires a determination that blacks not otherwise personally discriminated against should be treated preferentially over equal whites. The facts reveal that none of plaintiffs sought employment with the Company before 1965, the effective date of Title VII. And additionally, the district court did not find that the Company has discriminated in hiring since 1965. The result which plaintiffs seek, therefore, is not that personal remedial relief available under Title VII, but rather a preferential treatment on the basis of race which Congress specifically prohibited in Section 703(j)."

In other words, the workforce statistics showing virtually no blacks were not determinative of liability

because the statistics resulted from acts occurring before the effective date of Title VII. This was not recognized, however, until the Court of Appeals, unlike here, focused upon whether there were identifiable victims of discrimination, rather than on the statistics alone.

Another problem with the presumption of discrimination based on workforce statistics is that the disparity may be the product of cultural and educational deprivation which, in some cases, may reduce the number of minority group members able to compete effectively for the specific positions at issue below the level indicated by unrefined population statistics. This cannot, *ipso facto*, be directly attributable to the particular employers being challenged. No one will question that employers and courts must assure that an employer's practices do not unjustifiably perpetuate these effects. It is unfair, however, automatically to presume discrimination on the part of the particular employer simply because of a statistical underrepresentation. Recognition of this unfairness is implicit in this Court's recent reevaluation of the disproportionate impact theory in *Washington* v. *Davis*, No. 74-1492, 12 FEP Cases 1415, 1421-22 1976). As this Court recognized, there are any number of enactments that may be more burdensome "to the poor and to the average black" (12 FEP Cases 1422). It is submitted that this results from the historical deprivation suffered by the poor and the black generally, not because of otherwise well intentioned, necessary and racially neutral statutes. Thus, in the employment context one may also question "how a [standard] establishing a racially neutral qualification for employment is nevertheless racially discriminatory . . . simply because a greater

proportion of Negroes fail to qualify than members of other racial or ethnic groups." (12 FEP Cases 1421).[5]

B. *The Proper Role of Statistics In Identifying Victims of Discrimination.*

Griggs v. *Duke Power Co.*, 401 U.S. 421 (1971), illustrates that workforce percentages are not necessarily determinative of the existence of illegal discrimination. There this Court held that when there was proof that blacks were eliminated at a *disproportionate rate* by the employer's tests and educational requirements, these requirements should be enjoined unless justified by business necessity. But there is no suggestion in *Griggs* that it can be presumed, as it was by the Court of Appeals in this case, that *every* black who the plaintiffs may contend is in the class was discriminated against by the employer simply because of a statistical underrepresentation in the workforce. On the contrary, because the Court centered on the rate of rejection for vacancies, it is implicit that the only ones who could properly be included in the *class of victims* are those who applied for the vacancies at issue and who were discriminatorily rejected by the educational, testing or other employment criteria.

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[5] Similarly, see *Coopersmith* v. *Roudebush*, 517 F.2d 818 (C.A.D.C. 1975) wherein the court sustained the employer's "recent legal experience" job requirement, despite the fact that it resulted in a substantially higher rejection rate for certain applicant groups. Cf., *Tyler* v. *Vickery*, 517 F.2d 1089 (1975), cert. denied, No. 75-1026, June 14, 1976 (Bar examination not discriminatory despite disproportionate impact on blacks).

Indeed, another panel of the Fifth Circuit in *Hester* v. *Southern Railway Co.*, 497 F.2d 1374, 1379 n. 6 (5th Cir. 1974), severely questioned the type of statistics routinely employed in attempts to establish Title VII *prima facie* cases. Thus, even though the plaintiff there introduced Census and Standard Metropolitan Statistical Area (SMSA) data, the court concluded that "[m]eaningful comparison with the statistics for the general population was not possible on the record." (*Ibid.*). Further the court noted that comparison with general population data is of "questionable value" when considering positions for which the general population is not qualified. It also questioned whether statistics concerning the percentage of blacks in the area who were qualified for the specific job would be valid, as these figures still would not provide information on the "applicant pool and its racial composition." Thus, rather than merely accepting gross population statistics as evidencing discrimination, the *Hester* court evaluated whether the statistics presented were relevant to the particular job skill in question.

Thus, statistics on the rate of rejection may be relevant to the issue of whether a policy with a discriminatory impact should be prospectively enjoined. But when there is no general employment policy which is shown to be discriminatory, or when determining whether specific individuals actually are the victims of a discriminatory policy, it is the standard developed in *McDonnell Douglas* v. *Green* which should apply. That is, only those persons who can show that they applied or otherwise manifested their interest in vacancies during the relevant period and who were qualified should be presumed to be in the

class who can claim they were victims of a policy which is shown to be discriminatory.

An example of this type of approach is *Franks* v. *Bowman Transportation Co., supra*, 47 L. Ed.2d 444. There the discriminatory seniority system was enjoined prospectively, but the seniority relief was limited to a class of identifiable individual blacks who had applied for over the road positions and whose applications were put in evidence at trial. (47 L. Ed. at 457, 458 n. 10). The same approach was followed by the Sixth Circuit in *Thornton* v. *East Texas Motor Freight*, 497 F.2d 416, 419 (6th Cir. 1974) where the Court enjoined the discriminatory practice for the benefit of blacks generally, but the class entitled to a full seniority carryover relief was properly limited to those city drivers who specifically requested a transfer or who filed a charge of discrimination with the EEOC.[6]

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[6] Similarly, in *ACHA* v. *Beame*, 531 F.2d 648 (2d Cir. 1976), the Second Circuit, to insure that the relief was limited to those "who had actually been discriminated against," set out the following test (531 F.2d at 656):

> "For guidance of the district court, we suggest that the burden of satisfying the court on this issue by a preponderance of the evidence should be on the individual plaintiffs. The female police officer might, for example, satisfy her burden by demonstrating that she actually filed an application for employment or wrote a letter complaining about the hiring policy early enough during the period of discrimination, or offer proof that she had expressed a desire to enlist in the police force but was deterred by the discriminatory practice barring females."

C. *The Court's Misplaced Reliance on Statistics Resulted In An Erroneous Determination That All Members of the Purported Class Were Victims of Discrimination.*

In contrast to the careful manner in which other courts have sought to identify victims of discrimination, the Court of Appeals in this case made a quantum jump from the statistical presumption of "past discrimination" to the presumption that all members of the purported class were the victims of discrimination. Based on the record evidence, however, no one can say for sure whether anyone in the alleged class suffered as a result of the alleged discrimination. The effect on other city drivers of the no transfer policy, the seniority rules, and the qualifications for road driver simply were not issues which were adequately developed in the district court. There was no evidence as to the number of vacancies available, the desire of others to transfer, their qualifications relative to others seeking road driver jobs, or any other facts upon which a judgment that other city drivers may have been discriminatorily denied road driver vacancies could be based.

Indeed, there is evidence from which it can be assumed that many could not have been adversely affected by the challenged policies because many in the class would not assert that they had ever applied for or had any desire to be road drivers. Although perhaps the road driver position is the "prestige" position, it is a different job. As the Court of Appeals acknowledged, it requires longer hours and long periods away from home. Many of the city drivers are domiciled in cities where there are not terminals for ~~city~~ road drivers, so to transfer would require a reloca-

tion from their chosen place of residence.[7] When a transfer right was opened up to all city drivers, there were only a small number who ultimately transferred. Moreover, the record establishes that a majority of the Mexican-American and black city drivers who were members of defendant local union voted against a merger of the city driver and road driver seniority rosters, which suggests they had no desire to transfer.

The failure of the plaintiffs to present any evidence that any other city driver applied or was qualified for a road driver's position, plus the evidence suggesting that many of the city drivers had no desire to transfer, are simply irreconcilable with the Court of Appeals' conclusion that all minority city drivers were discriminated against. Again, there is *no evidence* that any of the class victims met the *McDonnell Douglas* v. *Green* standard, and substantial evidence that many of them could not.

The Court of Appeals reasoned that nothing in the *McDonnell Douglas* standard is inconsistent with the accepted practice of recognizing statistics as establishing a *prima facie* case in a class action.[8] While the statistics may be evidence of historical discrimination generally, it is totally inconsistent with *McDonnell Douglas* to suggest that it can be presumed from the statistics that every member of the class

[7] Only six of the 21 terminals in Texas domiciled road drivers.

[8] Although this Court in *McDonnell Douglas* was concerned with the burden of proof in an individual case, nothing in that opinion foreclosed a consideration of the applicability of the principles in that case to class actions.

was discriminated against when there was no evidence that *any* member satisfied the *McDonnell Douglas* standard.

The undue reliance on statistics instead of proof was further evidenced by the Court of Appeals' attempt to distinguish *McDonnell Douglas* on the grounds that *McDonnell Douglas* involved an applicant for employment, but in this case "it is not unreasonable to assume that minority persons [would] . . . be reluctant to apply." (505 F.2d at 55). The *only* evidence on the issue of whether or not city drivers were inhibited from applying is that the three named plaintiffs were *not* so inhibited. As to whether any other city driver was reluctant to apply, the Court of Appeals assumption is based only on conjecture.

Similarly, the Court rejects the significance of the vote by a majority of the blacks and Mexican-American employees in which a merger of the seniority rosters was rejected because, among other reasons, this does "not meet the question why those blacks and Mexican-Americans who have desired to transfer have not been permitted to do so. . . ." (505 F.2d at 57). Again, this is based on speculation, not proof. There was no evidence, other than that relating to the named plaintiffs, that any other city driver who desired to transfer was not permitted to do so.

In other contexts the courts have warned that "[it] is clear that Title VII actions cannot be successfully maintained on the basis of conjectural and speculative evidence." *Harper* v. *Trans World Airlines, Inc.*, 525 F.2d 409, 414 (8th Cir. 1975); *Robinson* v. *City*

of Dallas, 514 F.2d 1271, 1273 (5th Cir. 1975). See also, *Wright* v. *Stone Container Corp.*, 524 F.2d 1058, 1062 (8th Cir. 1975) where the Court affirmed dismissal of a class action when the named plaintiff was unable to establish a *prima facie* case under the *McDonnell Douglas* standard and because "he could only speculate that approximately 200 past and present employees" were also affected by the challenged practices.

It is the obligation of the district court to determine, based on the proof presented at trial, whether discrimination was established and, if so, against whom. In this case there was no evidence to justify a finding in favor of all other city drivers. For the Court of Appeals to find that each of the class members was a victim entitled to relief, without sufficient proof, constitutes undue usurpation of the district court's function without the benefit of an adequately developed record.

As this Court stated in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430-31 (1971):

> "In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."

Apparently, the Court of Appeals would leave the "winnowing" out of those not properly in the class to the remedy stage of the case. But this is incongruous. How can a finding of liability be entered in someone's favor, when implicit in this conclusion is

that when one centers on the remedy, that person may be shown not to have been injured? As this Court stated, the purpose of the remedy is "to make persons whole for *injuries suffered* on account of unlawful employment discrimination." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 422 (1975) (emphasis added). Other Courts have consistently held that proof of actual damages must be predicated on a showing that the class members were qualified for and denied particular vacancies. *Green* v. *Missouri Pacific R.R. Co.*, 523 F.2d 1290, 1299 (8th Cir. 1975); *Hairston* v. *McLean Trucking Co.*, 520 F.2d 226, 231-232 (4th Cir. 1975); *EEOC* v. *Detroit Edison Co.*, 515 F.2d 301, 314-16 (6th Cir. 1975), pet. for cert. pending in Case No. 75-720; *Norman* v. *Missouri Pacific R.R. Co.*, 497 F.2d 594 (8th Cir. 1974). Indeed, as the Fifth Circuit stated in *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 437, 444-45 (5th Cir. 1974):

> "[T]he initial burden will be on the individual discriminatee to show that he was available for promotion and possessed the general characteristics and qualifications which are shown . . . to be possessed by the higher paid white employees and are job related."

In practical effect, deferring the issue of individual discrimination to the remedy stage results in no judicial economy; it merely postpones application of the *McDonnell Douglas* standard. If no identifiable victims can be demonstrated in this second proceeding, then it may often be the case that no unlawful discrimination has occurred, but rather that other, nondiscriminatory or time-barred factors were the source of the statistical imbalance. See *supra* pp. 6-12. See

e.g., *Washington* v. *Davis, supra.* Or, it may be established that the number of identifiable victims is substantially smaller than is presumed based upon the statistics. Then the failure to apply the *McDonnell Douglas* test in the liability stage may result in more expensive and protracted litigation. Because of the inevitable fallacies in the reliance upon unexamined statistics, until the focus is on who are the identifiable victims of acts of discrimination, the parties and the court are operating in a factual vacuum. Therefore, the earlier in the proceeding the *McDonnell Douglas* standard is applied, the sooner the ultimate issue of liability will be resolved, and the greater the possibility of settlement without trial.

In short, because the analysis in accordance with the *McDonnell Douglas* will ultimately be necessary, there is no valid reason for not applying it in the liability stage.

II. The Court of Appeals' Reversal of the Class Action Dismissal and Its *Sua Sponte* Certification of the Class Is Not Supported By the Record and Is Contrary to Rule 23 of the Federal Rules of Civil Procedure.

Pursuant to stipulation, *there was no evidence presented* of others in the purported class who had claims similar to that of the named plaintiffs. The district court concluded that because the plaintiffs had not moved for an order pursuant to Rule 23(c)(1) and had not presented any proof as to liability to the class, the class claim should be dismissed. On appeal, the plaintiffs conceded that the case had not been tried as a class action in the district court and their prayer was limited to a request that the case be "remanded to the district court for consideration of the

class action allegations" (Pltfs. Brf. to 5th Cir. at 48).

Notwithstanding this status of the record, the Court of Appeals on its own initiative certified a class of all Mexican-Americans and black city drivers included under the collective bargaining agreement covering the State of Texas.[9] This was based on the mystifying assumption by the Court of Appeals that "we have before us a record of the proceedings, completed as a class action . . ." 505 F.2d at 51. This cannot be squared with (1) the plaintiffs' failure to move for certification; (2) the stipulation that only the individuals' claims were at issue; (3) the express finding by the district judge who heard the evidence that "plaintiffs offered no proof of liability or damages as to any class" and that the post trial arguments were limited to the individual claims; and (4) the plaintiffs' admission on appeal that "the class action was never considered by the lower court" (Pltfs. Brf. p. 48).[10] There was simply no basis for

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[9] Interestingly, the Court of Appeals held that outside applicants should not be included in the class because "the plaintiffs never pursued the action on behalf of these individuals." As discussed in the text, this same conclusion should have also followed with respect to the issue of whether the class of city drivers should be certified.

[10] The only support cited by the Court of Appeals for its conclusion was a colloquy during trial in which the plaintiffs' attorney indicated that apparently they had second thoughts about the stipulation and they still *claimed* to represent a class. But what must, of course, be determinative is their failure to present any evidence on the class and their post-trial acknowledgement that the matter had not been tried as a class action.

the Court of Appeals conclusion that the district court's finding was clearly erroneous.

Even more irreconcilable with traditional standards of appellate review was the Court of Appeals' *sua sponte* certification of the class. Apparently, this was prompted by the Court of Appeals' presumption that Title VII suits are "inherently class suits." In many respects, this is closely related to the court's wholesale reliance upon the statistical presumption because the only apparent basis for the Court of Appeals' certification of the class was an instinctive feeling that other employees in the city drivers' classification must have been discriminated against because of the underrepresentation statistics. Because of the EEAC's concern that this presumption may be taken too literally, and in order to place the issue in perspective, it is necessary to note initially that the presumption is far from universally accepted. Numerous other courts have held that much closer attention must be given to the prerequisites for class action treatment expressed in Rule 23. Accordingly, various considerations which other courts have found applicable to Title VII class action claims which were not given due consideration by the Court of Appeals in this case are set out below.

It would seem axiomatic that the determination of whether the action shall be maintained as a class action should be made *before* a trial on the merits. Indeed, Rule 23(c)(1) specifically mandates such a determination "as soon as practicable after the commencement of the action." Due process requires that the parties know the full scope of the issues before evidence is presented. A principal objective of the 1966 revisions to Rule 23 was to insure against the

unfairness of allowing class members to decide whether they were in or out of the class following a judgment. Thus, the class should be identified before trial on the merits so it will be bound by all subsequent orders and judgments. *American Pipe and Construction Co.* v. *Utah*, 414 U.S. 538, 545-47 (1974).

Or, as then Judge Stevens stated in his dissent in *Sprogis* v. *United Airlines, Inc.*, 444 F.2d 1194, 1207 (7th Cir. 1971):

> "At a minimum, this rule requires the class to be defined before the merits of the case have been decided. This requirement is, of course, of special importance in litigation involving claims for damages or backpay. A procedure which permits a claim to be treated as a class action if plaintiff wins, but merely as an individual claim if plaintiff loses, is strikingly unfair."

In this case, the Court of Appeals has found liability in favor of a class, without even giving the defendants an opportunity to present evidence in opposition to the class claims. This is strikingly unfair.

In making the determination, the mere *claim* (without factual support) by the plaintiffs that they represent a class cannot be sufficient. The burden is on the plaintiff to establish facts sufficient to show that all of the prerequisites of Rule 23 have been met. *E.g.*, *Poindexter* v. *Teubert*, 462 F.2d 1096, 1097 (4th Cir. 1972). As stated, for example, in *Taylor* v. *Safeway Stores, Inc.*, 524 F.2d 263, 270 (10th Cir. 1975):

> "If the mere assertion of widespread employment discrimination were sufficient to satisfy the typicality requirement, subsection (a)(3) would again be superfluous, since it would be unrealistic for a court to compare the claims and defenses of the plaintiff with the claims and defenses of a hypothetical class."

In this case, the plaintiffs did no more than *assert* a demand for class treatment. They did not even purport to present evidence in support of their allegations.

As with any allegation in the complaint, it is the district court's responsibility to determine whether the evidence presented by the plaintiffs supports the class action allegations. And, contrary to the Court of Appeals' presumption that Title VII cases are inherently class actions, it is not uncommon for plaintiffs to fail in this burden. For example, as found by the court in *Winfrey* v. *General Motors Corp.*, 11 FEP Cases 649, 650 (N.D. Ga. 1974):

> "As plaintiff's complaint merely repeated the wording of Rule 23(a) without any attempt to allege specific facts which would substantiate the allegations as to the propriety of class action treatment, we found the allegations insufficient for a Rule 23(c)(1) determination and required an affirmative showing as to the class allegations. Despite this requirement . . . plaintiff has not sought to make any showing that the alleged class exists, that there are questions of fact and law common to the class, that the claims of the plaintiff are typical of the alleged class, or that he is the proper representative of the alleged class. From plaintiff's total failure to comply . . . we must conclude that he is unable to, or

> does not care to, show the court that the action should be maintained as a class action."

See also, *Thompson* v. *Sun Oil Co.*, 523 F.2d 647, 649 (8th Cir. 1975); *Poindexter* v. *Teubert*, 462 F.2d 1096, 1097 (4th Cir. 1972); *Villarreal* v. *Braswell Motor Freight Lines*, 11 FEP Cases 831 (S.D. Tex. 1975); *Smith* v. *Liberty Mutual Ins. Co.*, 11 FEP Cases 734, 738 (N.D. Ga. 1974); *Kinsey* v. *Legg, Munson & Co., Inc.*, 60 F.R.D. 91, 100 (D.D.C. 1973).

Because, like any other allegation in the complaint, it is the plaintiffs obligation to come forward with the facts to support the class action allegations, there is no basis for putting the burden on the district judge to initiate the class determination. In an adversary system, the burden to make the motion should be on the one asserting the claim. It has never been the duty of a district judge to conduct the parties litigation for them. In this case, there was nothing inconsistent or unusual in the plaintiffs determining that they did not have sufficient facts to support a class action or that they could not adequately represent the class. When they failed to seek certification, and when, after a full trial there was no apparent change in their position, the district judge properly dismissed the class action. See *e.g.*, *Kaplan* v. *IATSE*, 7 F.E.P. Cases 895 (C.D. Cal. 1973).

Once facts are presented in support of a proper motion it is then the district court's responsibility to analyse those facts to determine whether the Rule 23 prerequisites have been met. In contrast to the Court of Appeals approach in this case, most courts have found that this requires much greater attention to the particular claims of the plaintiffs. For example, in *Smith* v. *Liberty Mutual Ins. Co.*, 11 FEP

Cases 734 (N.D. Ga. 1974) the court in rejecting the contention that every action based on race discrimination states a case for class action treatment, observed (11 FEP Cases at 739):

> "In terms of practicality there is no more difficult procedural problem than the one present. If one rejected applicant or one discharged employee or one unpromoted worker files a complaint, does that automatically subject an employer to account for thousands of jobs it may have and indeed, defend his whole employment practices over a period of years? Similarly, for the court, does such a naked complaint trigger an investigation which can proceed at great time and expense to unknown breadth and scope? Reason dictates that there be some preliminary showing that plaintiff's treatment was occasioned by a broad policy of discrimination and that the results were dictated by that policy and not by the specifics of his claim."

Here the trial turned on the particular facts relating to the named plaintiffs applications and individual qualifications for the job. Therefore, even if the plaintiffs had attempted to show others who were similarly situated, the specific facts surrounding their claims may have shown that their claims were so individualized that the requisite commonality and typicality could not be established. For example, it was held in *Patterson* v. *General Motors Corp.*, 10 FEP Cases 921 (N.D. Ill. 1974), as follows:

> "Moreover, even if the plaintiff were to specify grievances of other members of the purported class, the acts for which plaintiff complains are not susceptible to class treatment. For example, as noted, plaintiff claims that he was replaced by

> another employee, denied promotion, unjustifiably disciplined, compelled to return prematurely from leave, and prevented from holding a position in the union. But, the issue of whether a particular job assignment or a promotion denial was discriminatory would depend upon any number of factors peculiar to the individuals competing for the vacancy, including relative seniority, qualifications, availability for work and desire to perform the job. . . . In other words, the plaintiff's claims do not relate to general policies or practices which are allegedly discriminatory, but rather to individualized claims of discrimination which could not possibly present common questions of law or fact sufficient to justify class action treatment."

Numerous other courts have also held that plaintiffs claims were too individualized to meet the Rule 23 prerequisites. *E.g.*, *Wright* v. *Stone Container Corp.*, 524 F.2d 1058 (8th Cir. 1975) (plaintiff who was not qualified for maintenance promotion not an adequate class representative); *Thompson* v. *Sun Oil Co.*, 523 F.2d 647 (8th Cir. 1975) (plaintiff who was unable to identify class members who similarly applied and were rejected cannot represent a class); *Marshall* v. *Target Stores, Inc.*, 11 FEP Cases 775 (E.D. Mo. 1975) (plaintiff claimed denial of compensation commensurate with her duties; no showing other persons had same or similar grievance); *Peltier* v. *City of Fargo*, 10 FEP Cases 701 (D.N.D. 1975) (class denied because plaintiff's promotion claim not typical of any class claims involving different job classifications); *Donaldson* v. *Pillsbury Co.*, 11 FEP Cases 577 (D. Minn. 1975) (claim of plaintiff hired outside normal channels for special

work is unique and not typical of any class); *Rockett* v. *Lyman*, 12 FEP Cases 224 (D. Haw. 1974) (class denied because of no showing of class members who were denied employment on basis of religion or that any positions other than the one applied for by plaintiff were available); *O'Brien* v. *Shimp*, 356 F.Supp. 1259 (N.D. Ill. 1973) (class denied in hiring case where no concrete, definable class was established); *Kinsey* v. *Legg, Mason & Co., Inc.*, 60 F.R.D. 91 (D.D.C. 1973) (class denied for failure to meet typicality and numerosity rules where no proof other blacks applied for retail sales positions); *Blankenship* v. *Wometco Blue Circle, Inc.*, 59 F.R.D. 308 (E.D. Tenn. 1972) (Rule 23 requirements not met where plaintiff only alleges single discriminatory incident); *Gresham* v. *Ford Motor Co.*, 53 F.R.D. 105 (N.D. Ga. 1970) (class denied where plaintiff's claims only involve particular actions against one individual).

It is further submitted that the issue of whether the plaintiffs can adequately represent the class must be given much greater consideration than was afforded this prerequisite by the Court of Appeals.

As observed by Judge Godbold in a perceptive concurring opinion in *Johnson* v. *Georgia Highway Express*, 417 F.2d 1122, 1126 (5th Cir. 1969) the presumption that broad class treatment is appropriate may be contrary to the interest of the class:

> "And, what may be most significant, an overbroad framing of the class may be so unfair to the absent members as to approach, if not amount to, deprivation of due process . . . One act, or a few acts, at one or a few places, can be charged to be part of a practice or policy quickening an

> injunction against all racial discrimination by the employer at all places. It is tidy, convenient for the courts fearing a flood of Title VII cases, and dandy for the employees if their champion wins. But what of the catastrophic consequences if the plaintiff loses and carries the class down with him, or proves only such limited facts that no practice or policy can be found, leaving him afloat but sinking the class?"

It should be the duty of the district judge, and not the appellate court on review, to determine "as soon as is practicable" whether the particular named plaintiffs have proved they have the resources and ability to engage in the type of expensive and protracted litigation necessary to present fully the claim of each potential class member.

Moreover, the district judge must determine, based on a full factual record, whether there are conflicts among the potential class members that may preclude fair representation. Certainly, for example, there should have been much more factual development of the seeming inconsistency between the seniority relief requested by plaintiffs and the vote against a seniority merger by a majority of the minorities in one local union. (505 F.2d at 50). Indeed, the Court of Appeals concedes that it "cannot tell what assumptions were made implicit" and the extent that the vote represents "the actual preference of the class, therefore, is unclear". Clearly, this potential conflict should have been resolved based on a hearing in which the parties presented the full record. The Court of Appeals assumption that there was no conflict between the named plaintiffs and employees included within the class by plaintiffs can not be supported.

In addition to the foregoing there may be many other facts which would show either that the plaintiffs claims were too individualized or conflict with other members of the purported class. But, as the result of the *sua sponte* certification, the Court of Appeals foreclosed the parties from presenting all relevant facts.

Finally, the Court of Appeals foreclosed the possibility of determining whether a notice to the class prior to the finding of liability is appropriate. In *Air Line Stewards and Stewardesses Ass'n.* v. *American Airlines, Inc.*, 490 F.2d 636, 643 (7th Cir. 1973), the court held that, to the extent that the plaintiffs merely sought a declaration that the challenged policy is discriminatory and should be enjoined, the action should be treated as a Rule 23(b)(2) class action. To the extent the plaintiffs sought affirmative relief for individual class members in the form of reinstatement or back pay, however, the action would have to be maintained from the beginning as a Rule 23(b)(3) class action. In accordance with Rule 23(c)(2), this would require a notice to the class members advising them of their right to exclude themselves. Alternatively, Rule 23(d)(2) authorizes the district court to require a notice whenever necessary "for the protection of the class or otherwise for the fair conduct of the action."

As discussed in Section I herein, the principal error by the Court of Appeals was its assumption that all members of the alleged class were the victims of the alleged discrimination, even though there was no evidence to support the assumption, and affirmative evidence suggested that many in the class could not establish injury. It is submitted that the sensi-

ble and practical solution to this dilemma is to send a notice to the alleged class prior to certification describing the nature of the case and requesting each potential class member to state whether he claims that he was injured by the alleged practice and, if so, to state the facts in support of his claim. *See, Gerstle* v. *Continental Airlines, Inc.*, 406 F.2d 1374, 1376 (10th Cir. 1972). Such an approach was employed at the remedy stage in *Thornton* v. *East Texas Motor Freight*, 497 F.2d 416, 422-423 (6th Cir. 1974). It would seem even more logical to use such a notice prior to the class determination in a case such as this. This would allow the district judge to make the most meaningful and accurate determination as to whether the plaintiffs' claims are common to a numerous class of similarly situated claimants and whether the plaintiffs can adequately represent the class. The possibility of limiting the class or of creating subclasses could also be considered. Moreover, such a notice would present the unfair and incongruous holding in this case that all members in the class were victims of the discrimination, even though at the remedy stage (presumably after a notice is sent) they may not be able to show they were injured.

The district court's determination that the class action should be dismissed was not shown to be clearly erroneous. The Court of Appeals compounded its error by presuming that a class action was appropriate without an analysis of all relevant factors. As the foregoing authorities establish, the assumption that Title VII class actions are inherently class actions is too simplistic. Accordingly, at minimum, the Fifth Circuit should have vacated and remanded

the case to the district court for a determination pursuant to Rule 23(c)(1) of whether a class action is appropriate and, if so, who should be in the class. This should have been done in accordance with appropriate standards for affording the parties an opportunity to present a full factual record on this issue.

CONCLUSION

It is submitted that the guiding principle for Title VII was succinctly stated by this Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971), as follows:

> "Discriminatory preference for any group is precisely and only what Congress has proscribed."

It is the concern of the EEAC that an undue reliance upon statistical inferences of discrimination as evidenced by this case and others can undermine this basic objective. Statistics should be assigned no greater weight than is consistent with fairly and accurately identifying the victims of discrimination. The Court of Appeals' fallacious application of the statistical presumption in this case cannot be justified. Additionally, the court's class action determination undermined the purposes of Rule 23 FRCP, and undercut the district court's authority in this respect, without the benefit of a complete record having been established. Both actions of the Court of Appeals are inconsistent with the fundamental purposes of Title VII.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

Nos. 75-651, 75-715, and 75,718
(Consolidated)

No. 75-651
TEAMSTERS LOCAL UNION 657, *Petitioner*
v.
JESSE RODRIGUEZ, ET AL., *Respondents*

No. 75-715
SOUTHERN CONFERENCE OF TEAMSTERS, *Petitioners*
v.
JESSE RODRIGUEZ, ET AL., *Respondents*

No. 75-718
EAST TEXAS MOTOR FREIGHT SYSTEM, INC., *Petitioner*
v.
JESSE RODRIGUEZ, ET AL., *Respondents*

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER SOUTHERN CONFERENCE OF TEAMSTERS

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SUBJECT INDEX

Page

I. The Seniority System and Union Petitioners Do Not Violate Title VII 2

II. This Court has not improvidently granted the Writs herein 6

III. The Court should render decision on the issues presented by Union Petitioners 10

CONCLUSION 14

CITATIONS

CASES:

Bing v. *Roadway Express Co., Inc.*, 485 F.2d 441 (5th Cir. 1973) 13

Brotherhood of Locomotive Firemen v. *Bangor Aroostook R.R.*, 389 U.S. 327 (1967) 9, 10

Franks v. *Bowman Transportation Co.*, 424 U.S. 747, 47 L.Ed.2d 444 (1976) 2, 3, 4, 8

Guerra v. *Manchester Terminal Corp.*, 498 F.2d 641 (C.A. 5, 1974) 9

Herrera v. *Yellow Freight System, Inc.*, 505 F.2d 66 (5th Cir. 1974) 13

Resendis v. *Lee Way Motor Freight, Inc.*, 505 F.2d 69 (5th Cir. 1974) 13

Rodriguez v. *East Texas Motor Freight, Inc.*, 505 F.2d 40, (5th Cir. 1974, cert. granted, Nos. 75-651, 75-715, and 75-718) 8, 16

Sagers v. *Yellow Freight Systems, Inc., et al*, — F.2d — (5th Cir. 1976) 12

United States v. *East Texas Motor Freight Systems, Inc.*, (No. 75-3332, appeal pending, United States Court of Appeals for the Fifth Circuit) ..6, 7, 8, 12, 13

United States of America v. *Terminal Transport, et al.*, (No. 16761, United States District Court for the Northern District of Georgia) 12

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On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONER SOUTHERN CONFERENCE OF TEAMSTERS

At the date of this writing, the Mexican American Legal Defense and Educational Fund (MALDEF) as attorney for Respondents,[1] and the NAACP Legal

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[1] A brief has also been filed on behalf of Ernest Herrera, Trini Uribi, Mario Melchor, Patrick Resendis, Tony Escobedo and Elias Gonzalez. That brief raises no arguments beyond those contained in MALDEF's brief and we therefore address our response solely to the MALDEF brief.

Defense and Educational Fund, Inc. (NAACP), as *amicus curiae,* have filed briefs in response to that filed by petitioner Southern Conference in the above consolidated cases. A memorandum by the Justice Department and Equal Employment Opportunity Commission (the Government), as *amicus curiae,* has also been received and apparently filed. Petitioner Southern Conference addresses the arguments raised by MALDEF, NAACP and the Government as follows:

I.

The Seniority System and Union Petitioners Do Not Violate Title VII.

MALDEF's position on the merits of the substantive issues presented is, of course, largely refuted by the failure of the Government or the NAACP to support it. (See discussion, *infra.*) Moreover, MALDEF's brief simply does not address the considerations which dictate a finding that the contract seniority system and union petitioners have not violated Title VII.

In its original brief herein, Petitioner Southern Conference noted that no seniority system can automatically grant seniority to individuals whom an *employer excludes* from the bargaining unit in which the system operates. Here, the allegation is that ETMF, by virtue of hire and transfer policies, discriminatorily excluded minorities from the road bargaining unit. Those employer wrongs are the sole cause of any detriment the Respondents have suffered. The seniority system never applied to them and never constituted an operative barrier to their entry into the road unit. The only such barrier was the employer's hiring and transfer policies. As in *Franks* v. *Bowman*

Transportation Co., 424 U.S. 747, "the underlying legal wrong * * * is not the alleged operation of a racially discriminatory seniority system, but of [an alleged] racially discriminatory hiring [and transfer] system." *Franks, supra* at 758. And, as in *Franks,* Respondents do not seek as seniority relief "dismantlement or fundamental change of the seniority system, or even the merger of separate rosters into a single list," (MALDEF Brief, p. 85.) Further, as *Franks* holds, the actual victims of hiring and transfer discrimination are by virtue of § 706(g), the Act's remedy provision, entitled to "their rightful place in the hierarchy of seniority." *Id.* at 768; see also 762-70. Thus, the system cannot constitute even a secondary obstacle to Respondents' enjoyment of equal employment opportunity.

The seniority system at issue simply grants job seniority after entry into the particular (road, city, garage or office) bargaining unit. It is entirely distinct and independent from hiring and transfer policies which the employer unilaterally controls. The seniority system is neutral on its face and in its origin,[2] is preferred by affected employees, and has not been used or applied to deny minority "victims" their

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[2] MALDEF asserts at p. 74 of its brief that "the purpose and effect of petitioners' no-transfer rules and dual seniority system were to prevent minority city drivers from obtaining road positions." The record references which follow (A.155, 174, 233) demonstrate no such purpose in regard to "minority city drivers." In fact, MALDEF thereafter tacitly admits that the seniority system *is* neutral (non-discriminatory) in its origin.

See MALDEF Brief at pp. 89-90. And, of course, these seniority rules apply equally to *all* employees, regardless of race or national origin.

"rightful place."[3] The contracts at issue here both prohibit discrimination and provide a grievance and arbitration procedure as a mechanism by which discriminatees may achieve their "rightful place". Under these circumstances, no Title VII violation has occurred. (See Southern Conference Brief, pp. 23-36.)

MALDEF's response, boiled down, is to reurge the rote, unreasoning argument employed by the court below: arguing that ETMF has allegedly discriminated in the filling of road jobs, MALDEF says that because the subject contracts do not automatically effect a grant of road seniority to minority city employees, the contract seniority system and union petitioners violated Title VII. (See MALDEF Brief, pp. 80-109.) MALDEF thus seeks to confuse this court's holding in *Franks*—that a lawful, *bona fide* seniority system does not bar the award of seniority relief to Title VII discriminatees—with the inconsistent proposition that a seniority system which does not automatically give seniority to discriminatees cannot be *bona fide* and violates Title VII. We repeat: *No* seniority system can automatically grant seniority to those an employer

[3] At p. 101 of its brief, MALDEF states that "Teamsters Unions" have taken "positions of uncompromising opposition to any relief for any minority city drivers . . . ." Again, this statement is not supported by any record reference. Clearly, what MALDEF *really* complains about is the suggestion that minority city drivers should be required to show that they were discriminatorily denied road employment, as a prerequisite to the award of "rightful place" road seniority. This suggestion, by Southern Conference or any other entity, is entirely appropriate. As demonstrated *infra*, fn. 10, it cannot be assumed that all minority city drivers have discriminatorily been denied road jobs, and union entities have an obligation to protect incumbent road drivers from reverse discrimination. See Southern Conference Brief at pp. 31, 34-35 and cases cited therein.

excludes from the bargaining unit the particular system covers. This Court recognized as much in *Franks, supra.* (See Southern Conference Brief, at pp. 26-27.) The logical result of MALDEF's unreasoned argument is to make unlawful *any* seniority system in the context of discriminatory hiring and transfer practices by an employer. As we have demonstrated before, that is plainly not the intent of Title VII.[4]

MALDEF fails to acknowledge, or even to discuss, the obvious distinctions between the seniority system at bar and those others which have been the basis for a finding of Title VII violation. Compare MALDEF Brief at pp. 85-92 and Southern Conference Brief at pp. 27-30. Respondents seek, in effect, to make union petitioners responsible both for ETMF's unilaterally administered hiring[5] and transfer practices,[6] and for the failure of alleged discriminatees to seek redress through contract mechanisms, or otherwise even to complain about the contract seniority system.[7] Such

[4] See Southern Conference Brief, pp. 25-27.

[5] At p. 96 of its brief, MALDEF implies that Local 657 discriminated against minority individuals as "a referral source for applicants." As usual, there is no record reference. In fact, there is not a shred of evidence of either discrimination or referral of road applicants by any union entity.

[6] Contrary to MALDEF's assertions (see MALDEF Brief, pp. 94-96, 100) Southern Conference has directed local unions to urge ETMF and other employers to permit city employees to fill road vacancies on a preferential basis over off-the-street hires. (A. 214).

[7] At pp. 107-08 of its brief, MALDEF suggests that utilization of contract procedures or complaint about discrimination would have been futile. No record cite is made, and there is no record evidence to support such an allegation.

Nor does Southern Conference contend that a Title VII Claim is barred by failure to exhaust contract procedures. (See MAL

an approach has no support in the record here, nor in legal authority. For all the reasons stated in Southern Conference's original brief, this Court must conclude that as to the seniority system and union petitioners, no Title VII violation has occurred.

II.

This Court Has Not Improvidently Granted the Writs Herein.

NAACP contends that certiorari was improvidently granted because the Fifth Circuit's decision herein is allegedly supported by the record and partially mooted by relief [8] accorded in another case, now pending in the Fifth Circuit, *United States* v. *East Texas Freight System, Inc.* (No. 75-3332, appeal pending, United States Court of Appeals for the Fifth Circuit).[9] Thus, NAACP at once refuses to address the substantive issues presented by union petitioners, and instead seeks to place before this Court the record in another case, not yet decided below.

DEF Brief, pp. 108-09). We simply argue that, where alleged discriminatees neither complain nor seek to use contract grievance procedures to obtain their "rightful place," no Title VII violation has occurred.

[8] At page 3 of its brief, NAACP writes:

> The evidence which petitioners assert is required to support the decision below, which they object as absent from the record in this case, is to a substantial degree present and uncontested in *U.S.* v. *ETMF*. As to certain issues and class members, the instant case has been rendered partially moot by *U.S.* v. *ETMF*.

[9] NAACP also contends the petitions of Southern Conference and Teamsters Local Union 657 purportedly present questions "interlocutory in nature" (NAACP Brief, pp. 2-3, 16-18). This contention is addressed at fn. 14, *infra*.

As ETMF points out in its Reply Brief at pp. 18-19, NAACP's attempt to inject extra-record "evidence" into this case is wholly improper. Moreover, by a combination of innuendo [10] and omission, NAACP implies that the record in *U.S.* v. *ETMF, supra,* (selected parts are filed with this Court as an exhibit [EA]) would support a conclusion that the seniority system here at issue violates Title VII, and that Southern Conference (and Local 657) should be held liable there-

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[10] At page 12 of its brief, NAACP argues with Southern Conference's statement (Southern Conference Brief, p. 8) that the racial and national origin make-up of city *employees* at ETMF's Texas terminals *generally* reflects the racial-national origin make-up of the communities in which the terminals are located. (Emphasis added). See also, MALDEF Brief at pp. 5-9.

NAACP complains that at some terminals there are no minority city drivers, and that there is a disproportionately large percentage of minority drivers at others. NAACP disregards the fact that Southern Conference's reference was to city *employees*, rather than simply to city drivers (see Southern Conference Brief, pp. 5-8) and that various minority city employees, at various locations, used their seniority to claim non-driving city jobs (A. 369-73, 379). Moreover, the overall percentage of ETMF minority city drivers reflected in the Appendix to NAACP's Brief (35%) *does* resemble the minority population at the terminals involved. But even that is not the point.

The statistics set out in the Appendix to NAACP's Brief show that substantial numbers of "non-minority," anglo employees populate city jobs. If substantial numbers of anglos either (a) desire city work or (b) could not obtain road work, logically the same must be true of minority employees. This is *not* to say that some minority city employees have not been discriminatorily denied road jobs. It *is* to say that *it cannot be assumed that all minority city employees have been discriminatorily denied road employment.* That is precisely the assumption that underlies, and infects the reasoning of the Fifth Circuit and Respondents' argument upon the merits of the case. (See discussion at Southern Conference Brief pp. 30-36).

for.[11] In fact, cited testimony in NAACP's Exhibit will not support such a conclusion.[12]

Equally misleading is NAACP's implication that the trial court in *U.S.* v. *ETMF* concluded that the subject seniority system violated Title VII, and that the union entity involved (International Brotherhood of Teamsters) was liable for back pay as a result. See NAACP Brief, p. 6. To the contrary, it was *not* specifically held that the seniority system violated Title

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[11] At footnote 54 of its brief (pp. 16-17) NAACP states:

> The Conference also objects to monetary liability on the ground that the Teamsters actively support placing minority victims of discrimination in their "rightful place." Conference Brief, pp. 33-34. The record in this case reveals not a single instance in which union officials took action to prevent or remedy ETMF's flagrant policy of discrimination; *the record in U.S.* v. *ETMF, reveals a refusal to do so.* EA 87-88, 113-119. (Emphasis added).

[12] The record reference is to three conversations minority employees had with obscure representatives of local unions not involved in the instant case. Nothing there relates to conversations with representatives of Southern Conference or Local 657. The conversations reflect no claim that individuals there seeking road employment had previously been discriminated against in the assignment of road jobs. Rather, those individuals simply express a desire to bump incumbent road drivers from their jobs, *without a showing of discrimination.* The Fifth Circuit itself has acknowledged that, absent initial discrimination, minority employees are not "victims," and have no "rightful place." See *Rodriguez* v. *East Texas Motor Freight, Inc.*, 505 F.2d 40, 61-64 (5th Cir., 1974, cert. granted, Nos. 75-651, 75-715 and 75-718). And see *Franks* v. *Bowman Transportation Co.*, 424 U.S. *747*, 47 L.Ed. 2d 444 at 468, 471, 473-78 (1976). NAACP's suggestion that the record in *U.S.* v. *ETMF* supports a finding that Southern Conference or Local 657 has opposed the award of "rightful place" seniority to "minority victims" is absolutely inaccurate.

VII, and the employer alone was held liable for back pay.[13]

In sum, NAACP's consistent reference to the record in another case reduces, at bottom, to no more than a dissatisfaction with the record in the instant case; its consequent failure to address the substantive issues raised by union petitions herein is tantamount to a confession to the merit of union petitioners' arguments.[14]

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[13] A reading of the trial court's Order dated May 28, 1975 (see NAACP Exhibit, pp. 292-95) reflects no finding of Union Title VII violation. And missing from the NAACP's Exhibit is a June 26, 1975 Order wherein the trial court held:

> With respect to back pay, the undisputed facts of this case identify the employer (ETMF) as principally responsible for the discrimination against the affected class. By the consent decree back pay to the affected class was taxed against the employer, the party principally responsible for the discrimination in hire, and in prohibiting transfer. In these circumstances final responsibility for the monetary recovery is properly attributable to the employer, and not to defendant union. See *Guerra* v. *Manchester Terminal Corp.*, 498 F.2d 641 at 656 (C.A. 5, 1974). (The entire January 26 Order is reproduced in the Appendix attached to this Reply Brief, at pp. 1a-3a).

NAACP states, at fn. 19 of its Brief, that "the liability of the International to the seventy-nine (79) covered employees is the subject of a pending appeal in *U.S.* v. *ETMF.*" It fails to state that the Government is the appellant on that issue.

[14] Citing *Brotherhood of Locomotive Firemen* v. *Bangor Aroostook R.R.*, 389 U.S. 327 (1927), NAACP also argues that Southern Conference's writ should be dismissed because the Fifth Circuit has remanded the case to the trial court to "apportion some part of the total back pay liability to (Southern Conference and Local 657)." Of course, the Fifth Circuit has rendered a judgment herein (A. 68-111). That is the only jurisdictional prerequisite to this Court's review by writ of certiorari. 28 U.S.C. Sec. 1254(1). No party to this action suggests that the instant case is not ripe

III.

The Court Should Render Decision on the Issues Presented by Union Petitioners.

Likewise, the Government tacitly confesses that union petitioners' arguments are meritorious. Simultaneously, it seeks remand of this case for new trial, hoping there to adduce additional evidence, sufficient to convict the contract seniority system, Southern Conference and Local 657 of Title VII violation and liability.

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for review. And the authority tardily advanced by NAACP as basis for withdrawing the grant of the petitions herein is not on point.

In *Brotherhood of Locomative Firemen* v. *Bangor Aroostook R.R. Co., supra,* the Court of Appeals had "remanded to the District Court to consider whether there had in fact been a contempt, and, also, if there was a contempt, whether it was 'of such magnitude as to warrant retention, in part or to any extent, of the coercive fine originally provided for in contemplation of an outright refusal to obey'." 389 U.S. at 328. Since the Court of Appeals did nothing more than construct a legal framework in which the issue of contempt was to be tried, the case was not yet ripe for review by the Supreme Court, *Ibid.* Circumstances in the instant case are altogether different.

Here, the trial court found that East Texas Motor Freight, Southern Conference, Local 657 and the subject seniority system did not violate Title VII, and dismissed Respondents' claims. Rather than constructing a legal framework in which issues of Title VII violation and liability should subsequently be retried, the Fifth Circuit *reversed*, held upon the record presented that the subject seniority system violated Title VII, and that East Texas Motor Freight, Southern Conference and Local 657 were liable to plaintiffs as a result. The remand to the trial court was solely to apportion back pay liability among East Texas, Southern Conference and Local 657. Further trial as to the issues of Title VII violation and liability was foreclosed. As to those issues, now before this Court by virtue of union petitions herein, the judgment of the Court of Appeals was final in all respects.

Writes the Government at pp. 16-17 of its Memorandum:

> *The state of the record . . . makes this case inadequate for consideration by this court of important questions of liability and remedies in Title VII litigation . . . We therefore believe that the Court should not reach important substantive questions of Title VII enforcement in a context provided by the record in this case.* (Emphasis added)[15]

The Government openly admits that the record here will not support a finding that the subject seniority system and Union Petitioners have violated Title VII! It was not always so.

In this very case, as *amicus* in the Fifth Circuit, the Government sought flat reversal of the trial court's finding that the subject seniority system and Union Petitioners did not violate Title VII. In its brief to the Fifth Circuit,[16] it stoutly contended that record evidence was fully sufficient to warrant a finding that the contract seniority system and Union Petitioners violated Title VII "as a matter of law." The Government's brief argued that:

> "the statistical evidence introduced . . . establishes beyond question an ongoing pattern of race discrimination by the hiring of over-the-road drivers throughout the State of Texas . . . The motivation of the defendants in implementing the seniority rule need not be studied . . . the contractually

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[15] The government then suggests remand to the trial court for further processing as a class action, so that the trial court can examine "all of the evidence relevant to ETMF's employment practices and petitioners' defenses . . . ." (EEOC Memorandum, p. 17.

[16] The government's Brief in Rodriquez v. East Texas Motor Freight, et al, 505 F.2d 40 (5th Cir. 1975) is filed herewith as Southern Conference Exhibit A.

> mandated loss of seniority would place an impermissible burden upon the victims of East Texas' past discrimination. Absent some compelling business necessity, defendants' seniority . . . policies are violative of Title VII . . . justifications offered by the company and the union are insufficient to justify (such) an unlawful policy." Southern Conference Exhibit A, pp. 9, 14, 15, 16.

In conclusion, the Government's Fifth Circuit brief prayed that the appellate court "*reverse* the ruling below and remand this case for formulation of appropriate relief." (Emphasis added). (*Id.* at 27). Nowhere did the Government so much as hint that the case should be remanded for further trial as to liability. Nowhere did it acknowledge even the possibility of lack of evidence concerning liability.

Since the Fifth Circuit issued its decision herein, this case has continuously been cited by the Government as *controlling authority* for the proposition that the subject seniority system and various union bodies have violated Title VII and incurred liability as a result. See *Sagers* v. *Yellow Freight Systems, Inc., et al.*, — F.2d — (5th Cir. 1973); *United States* v. *East Texas Motor Freight, et al.* (No. 75-3332, appeal pending, United States Court of Appeals for the Fifth Circuit); and *United States* v. *Terminal Transport, et al.* (No. 16761, United States District Court for the Northern District of Georgia). For example, in *Sagers, supra* the Government states as follows:

> The Unions were properly held responsible for continuing the effects of past discrimination by their negotiations and interpretations of their collective bargaining agreements in a manner which required that blacks, who had been relegated to city driver positions, could transfer to road positions only with loss of company seniority. As the Court stated in Rodriquez, supra, 505 F.2d at p. 61:[14] (It is for the Unions') role in establishing separate seniority rosters that fail to make allowance for minority city drivers who had been discriminatorily relegated to city driver jobs (that the Unions) must be held accountable.

[14] Accord: Herrera v. Yellow Freight Systems, Inc., supra, 505 F.2d at p. 68; Resendis v. Leeway Motor Freight supra, 505 F.2d at p. 71; Bing v. Roadway Express, Inc., supra, 485 F.2d at p. 451.

Now, almost three (3) years after full participation at the Fifth Circuit level as *amicus,* the Government tells this Court that the record will not support the very proposition (concerning union Title VII violation and liability) upon which it has so often relied! It now suggests that retrial is necessary to support the Fifth Circuit's holding. A better (or worse) example of boot-strapping cannot be imagined!

Equally disturbing is the Government's contention that prejudice to "petitioners" requires retrial of this case. To this end, the Government cites as absent in the instant case, but present in *U.S.* v. *ETMF, supra,* various evidentiary elements which *relate solely to proof of alleged discrimination in hire by petitioner East Texas Motor Freight.* See Government Memorandum, pp. 16-17. Nowhere in the Government's Memorandum does it appear that Respondents, or the Government, or NAACP have been prejudiced in the trial of this case. Nowhere, in its Memorandum, does the Government contend that there exists in the record in *U.S.* v. *ETMF* evidentiary elements relating to *union* Title VII violation or liability.

It is enough now to say that the federal agency charged with enforcement of Title VII cannot, upon

this or any other record, justify a finding of union Title VII violation and liability. This Court's inevitable holding to that effect should not be delayed so that Respondents, or the Government, or NAACP, can blindly cast about in an attempt to make a record which would justify a different result. This Court should proceed forthwith to decide the issues presented by union petitioners herein.

CONCLUSION

Respondents fail to show legal or evidentiary basis to support the Court of Appeals' departure from the District Court's findings and conclusions. For the reasons set forth here and in its original brief, Petitioner Southern Conference prays that the decision of the Court of Appeals be reversed and that of the District Court reinstated.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA-3-60250B

UNITED STATES OF AMERICA, *Plaintiff*

v.

EAST TEXAS MOTOR FREIGHT INC., THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, *Defendants*

(Filed June 26, 1975)

Order Denying Plaintiff's Motion To Amend Order of May 21, 1975

The Court having considered the Plaintiff's Motion to Amend this Court's Order entered on May 21, 1975, the plaintiff's memorandum brief in support of said Motion, and the response thereto filed by defendant International Brotherhood of Teamsters, notes that the plaintiff seeks amendment of the order 1) to hold defendant International Brotherhood of Teamsters liable for back-pay, 2) to delete the portion of the Order providing for submission to the grievance procedure, subject to court review, and 3) to permit carryover seniority to affected class members transferring beyond the job market in which each is employed.

Upon consideration of the motion papers above described, and the entire record, the Court finds:

1. With respect to back pay, the undisputed facts of this case identify the employer as principally responsible

for the discrimination against the affected class. By the consent decree back pay to the affected class was taxed against the employer, the party principally responsible for the discrimination in hire, and in prohibiting transfer. In these circumstances final responsibility for the monetary recovery is properly attributable to the employer, and not to defendant union. See *Guerra* v. *Manchester Terminal Corporation,* 498 F.2d 641 at 656 (C.A. 5, 1974).

2. There is no basis in this record for limiting the access of employees, union, or employers to the grievance and arbitration procedure by which disputes as to working conditions, including seniority standings have traditionally, and fairly been determined. Such determinations as to affected class seniority allocations remain subject to court review in accordance with the provisions of the May 21 Order.

3. Nor is there basis for alteration of the seniority carryover provisions of the prior order. The plaintiff erroneously contends that this Court's May 21, 1975 Order conflicts with the previously entered Consent Decree by which ETMF agreed that Affected Class members could transfer to the road "at the terminal at which he is employed (if that terminal has an over-the-road operation) or at a terminal within the job market, or to a terminal of his choice (if the terminal at which he is employed has no over-the-road operation) . . ."

There is no conflict. The May 25, 1975, Order does not limit the situs to which Affected Class members may transfer. It relates only to the seniority standing they will have upon transfer. Those who transfer city to road at their home terminal, or within the job market area surrounding their home terminal, "wherein they might reasonably have been expected to seek and obtain road employment" will take with them seniority from the date of qualification for road employment.

Those who opt to move across the nation may still do so under the prior Consent Decree. But they may not take their prior seniority with them.

No white has ever had the option to carry seniority city or road in such a manner. There is no evidence in this record that any ETMF city driver at a non-road terminal might reasonably have been expected to seek and obtain road employment at a terminal outside the surrounding job market area.

To grant the plaintiff's request would be to place the discriminatees in better positions than they could have achieved without discrimination. This the Court may not do. cf. *Bing* v. *Roadway Express,* 485 F.2d 441 at 449 (5th Cir. 1973) and *Rodriguez* v. *East Texas Motor Freight,* 505 F.2d 40 at 63-64.

It is accordingly Ordered that the plaintiff's Motion to Amend this Court's Order entered on May 21, 1975, be, and it hereby is Denied.

Signed and Entered this 26 day of June, 1975.

/s/ Sarah T. Hughes
Sarah T. Hughes
United States District Judge

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